88-491

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

CITIZENS FOR JOHN W. MOORE PARTY, JOHN W. MOORE, and WILLIE ANDERSON,
Petitioners,

v.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state deprives a new party candidate of the right to free speech by prohibiting him from circulating his own election petitions because he was a circulator for another political party.

LIST OF PARTIES

In addition to the parties listed in the caption, the parties to the proceeding in the court whose judgment is sought to be reviewed are Respondents, the Illinois State Board of Elections ("State Board"), Theresa M. Petrone, Richard A. Cowen, John P. Dailey, John R. Keith, John J. Lanigan, David E. Murray, Langdon D. Neal and Wanda L. Rednour, in their official capacity as members of the State Board, and Nikki Zollar, James R. Nolan and Michael J. Hamblet, in their official capacity as members of the Board of Election Commissioners of the City of Chicago.

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Petitioners,

v.

BOARD OF ELECTION COMMISSIONERS
OF THE CITY OF CHICAGO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioners Citizens for John W. Moore Party, John W. Moore and Willie Anderson respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on April 18, 1988.

OPINIONS BELOW

The opinions of the Court of Appeals for the Seventh Circuit are reported at 845 F.2d 144, 794 F.2d 1254 and 781 F.2d 581, and are reproduced in the Appendix hereto.

The memorandum opinions, findings of fact, conclusions of law and orders of the United States District Court for the Northern District of Illinois (Hart, J.) are reported at 665 F. Supp. 1335 and 599 F. Supp. 662. They are reproduced in the

Appendix hereto.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983 and 28 U.S.C. §§2201-2202, Petitioners filed this suit in the Northern District of Illinois challenging the constitutionality of §10-4 of the Illinois Election Code. On October 2, 1982, the district court denied Petitioners' motion for a preliminary injunction. Following an unsuccessful emergency motion for an injunction pending appeal, this case returned to the district court for a trial on the merits of Petitioners' claims for declaratory and permanent injunctive relief. On November 28, 1984, the district court entered an order dismissing Petitioners' case. See p. G1, infra.

On Petitioners' initial appeal, the

Seventh Circuit first certified to the Supreme Court of Illinois the question whether "person," within the meaning of §10-4, includes a candidate soliciting signatures on his own behalf. See p. F1, infra. The Illinois Supreme Court declined to answer the certified question, 487 N.E.2d 946 (1986). See p. E1, infra. Thereafter, on July 8, 1986, the Seventh Circuit affirmed the Northern District's order with respect to §10-4's constitutionality as applied to Moore's supporters, but vacated the judgment and remanded the case for further proceedings regarding the application of §10-4 to candidates. See p. D1, infra.

On remand, the district court held that the §10-4 is constitutional as applied to candidates as well and entered its order and final judgment on June 24,

1987. See p. C1, infra.

The Seventh Circuit affirmed the district court's decision on the second appeal and entered its opinion and judgment on April 18, 1988. See pp. A1, B1, infra.

On July 14, 1988, Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including September 15, 1988.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of

> religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 10-4 of the Illinois Election Code provides in pertinent part:

> "[N]o person shall circulate or certify petitions for candidates of more than one political party, or for an independent candidate or candidates in addition to one political party, to be voted upon at the next primary or general election."

STATEMENT OF THE CASE

John W. Moore, a black, politically active resident of the Englewood community of Chicago, 665 F. Supp. at 1336; Tr. 8-10,[1] began a campaign for the

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[1] The trial transcript, document number 79 of the Record, is continuously paginated and will be referred to as "Tr.

state legislature in 1982 at the urging of citizens concerned that the community's needs were not being served by the regular Democratic Party. Tr. 11-12. Moore originally sought the Democratic Party nomination for Illinois state senate and, along with a small group of supporters, began to circulate election petitions to solicit signatures so that he could run as a candidate in the March 1982 Democratic primary.

Facing severe pressure from the organizations of two regular Democratic candidates and believing he could have no impact on the Democratic Party platform, Tr. 18, 46-52, Moore withdrew from the senate race before the March election and his name did not appear on the primary

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___." All other references to the Record will be denoted as "R. ____."

ballot. 665 F.Supp. at 1337; Tr. 18.

At this point, there was no legal barrier to Moore beginning a new party candidacy in the November general election. Accordingly, following the primary, in accordance with state law requirements for obtaining a place on the November ballot, Moore and the same small group circulated petitions for Moore as a new party candidate for the office of state representative. 665 F.Supp. at 1337-38. He called his new party the Citizens for John W. Moore Party ("Moore Party"). 599 F.Supp. at 664.

In order to qualify as a new party candidate for the general election ballot, Moore was required to obtain 1500 signatures on nominating petitions. 559 F.Supp. at 668; Tr. 20. Moore and his small group of supporters collected 3,829

signatures on nominating petitions in the traditional fashion by going door-to-door, personally speaking with voters and soliciting their signatures on the petitions. 665 F.Supp. at 1338; Tr. 14, 20-21.

Moore obtained 975 of the petition signatures himself. 665 F.Supp. at 1338. He circulated petitions not only to gather signatures, but also to talk to voters face to face to advocate his candidacy. Tr. 17. By personally circulating petitions, he also wanted to convey a message to voters and other circulators. Id.; Tr. 28-29. The message was "I'm a grass-roots candidate; I'm willing to do my own work, work with people firsthand, at every level; I want you to understand my platform and what I stand for." Tr. 28-29. Moore's personal

participation in the circulation efforts had the additional purpose and value of motivating others to circulate petitions for his nomination. Tr. 28-29, 98-99; 665 F.Supp. at 1338.

Furthermore, as a practical matter, without Moore's personal solicitation of 975 signatures and motivation of other supporters to gather the other necessary signatures, he would not have been able to secure the requisite number of signatures for his nomination. Tr. 29, 87; 665 F.Supp. at 1338. He could not afford to pay people to collect signatures, Tr. 28, and he could not afford other, more costly means of communication, such as billboards, signs, or newspaper, radio or television advertisements. Tr. 29. Moreover, expert testimony established that the use

of petition-gathering as a method of and vehicle for communication with voters is typical of new and small party candidates, and especially significant in determining whether they obtain a place on the ballot. Tr. 108-109, 128.

In response to objections filed by Moore's opponent, the Board of Election Commissioners of the City of Chicago, a Respondent, disqualified all the signatures Moore collected because the Moore Party was the second party for which Moore had solicited signatures in the 1982 election season, in violation of §10-4 of the Illinois Election Code. 665 F.Supp. at 1338; Tr. 27. Section 10-4 forbids any person, whether a candidate or not, who has circulated nominating petitions for a candidate in one party to circulate for a candidate of another

party or for an independent during the same election year. Ill. Rev. Stat. ch. 46, §10-4.

As a result of the disqualification of the signatures obtained by Moore, his petitions did not contain the requisite number of signatures to obtain a place on the general election ballot for the state representative race.

Disposition in the Lower Courts

Following his disqualification from the general election ballot, Moore, one of his supporters and his party sought preliminary injunctive relief in this suit challenging §10-4 under the First and Fourteenth Amendments to the United States Constitution. Petitioners argued, among other things, that §10-4 violates the free speech rights of candidates, and consequently, their parties and

supporters, to communicate directly with voters.[2]

Preliminary proceedings were held in the district court prior to the 1982 general election.[3] Following a trial on Petitioners' requests for declaratory and permanent injunctive relief, the district

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[2] Petitioners also argued that Section 10-4 violates the rights of independent and new party candidates to equal protection of the laws, is unconstitutionally vague and overbroad and that plaintiff's due process rights were violated by an unannounced change in the policies, practices or decisions of the Chicago Board of Election Commissioners. Furthermore, Petitioners contended that §10-4 impermissibly burdens the associational rights of candidates and their supporters. Those claims are not raised in this Petition.

[3] The case was tried on Petitioners' motion for temporary restraining order and preliminary injunction, which was denied by the district court on October 2, 1982. After briefly pursuing an emergency injunction pending appeal, Petitioners requested that the case be returned to the district court for trial on the merits.

court held that §10-4 did not violate Petitioners' constitutional rights in any respect. 599 F. Supp. 662 (N.D. Ill. 1984).

The Seventh Circuit partially affirmed the district court regarding the constitutionality of §10-4's restrictions on the association and other protected activities of non-candidate petition circulators. 794 F.2d 1254 (7th Cir. 1986) ("Moore II").[4] However, the appellate court vacated the district court's judgment and remanded the case for a more detailed determination

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[4] Before rendering this decision, the Seventh Circuit first certified to the Supreme Court of Illinois the question whether "person," within the meaning of §10-4, includes a candidate soliciting signatures on his own behalf. 781 F.2d 581 (7th Cir. 1986) ("Moore I"). The Illinois Supreme Court declined to answer the certified question, 487 N.E.2d 946 (1986).

concerning the specific burdens §10-4 imposes on candidates' free speech rights. Id. at 1263.

On remand the district court concluded, based on the original trial record, that §10-4 does not unconstitutionally restrict the speech rights of candidates and entered an order dismissing the case. 665 F. Supp. 1334 (N.D. Ill. 1987).

The Seventh Circuit affirmed the district court's order, 845 F.2d 144 (7th Cir. 1988) ("Moore III"), concluding, inter alia, that in prohibiting candidates such as Moore from circulating nominating petitions and advocating their own candidacies, §10-4 does not regulate core political speech, but only the "conduct" of gathering signatures on a petition. Id. at 146. At most, the

appellate court found, §10-4 regulates conduct that has an "expressive consequence." Id. Given this view, the Seventh Circuit concluded that such restrictions are constitutional so long as the state has a "legitimate" or rational justification and the restrictions are "viewpoint-neutral." Id. at 147. The state's "legitimate" stake here, the court found, is the interest in discouraging factionalization of parties. Id. at 148. Finally, the Seventh Circuit minimized the significance of any burdens on speech imposed by §10-4, by stating that Petitioners were free to engage in speech at any time or place other than during the circulation of election petitions. Id.

Thereafter, the court entered a

final judgment, for which Petitioners now seek a writ of certiorari to issue to the Seventh Circuit for review of its decision in Moore III.

REASONS FOR GRANTING THE WRIT

I.

The decision below fails to treat petition circulation as core political speech, and therefore is in direct conflict with this Court's opinion in Meyer v. Grant.

The present controversy raises critical issues regarding the extent to which states can legitimately regulate the "core political speech" of political candidates and their supporters. The effect of §10-4 in this case was that Petitioner Moore was denied the opportunity to engage in speech in the most effective manner and at a vital

stage of a grass roots political campaign.

This Court has always considered cases that involve governmental restrictions on the free speech rights of political candidates to be important disputes worthy of review. See Brown v. Hartlage, 456 U.S. 45 (1982); Buckley v. Valeo, 424 U.S. 1 (1976). The special nature of these rights is premised on the critical role a candidate's speech plays in the democratic process. As this Court observed in Buckley:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the

> candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

424 U.S. at 52-53.

In concluding that the state's restrictions on candidates' speech are constitutionally valid, the Seventh Circuit is in conflict with this Court's most recent treatment of these issues in Meyer v. Grant, ____ U.S. ____, 108 S. Ct. 1886 (1988), in three significant ways. First, the appellate court failed to acknowledge that the circulation of candidate petitions is so intertwined with the advocacy and discussion of candidates' views on political issues that it constitutes core political speech. Second, the Seventh Circuit refused to examine §10-4's burdens with the exacting scrutiny to which such

measures are subject. Finally, the court disregarded any burdens §10-4 imposes on protected expression because of the availability of alternative avenues of communication

1. Circulation of Election Petitions Is Core Political Speech.

Recognizing that vital expression occurs through the interpersonal communication during the circulation of political petitions, this Court recently held that petition circulation is "core political speech" and that government restrictions upon that speech are subject to exacting scrutiny under the First Amendment. Meyer v. Grant, ___ U.S. ___, 108 S.Ct. 1886, 1891-92 (1988). See also Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

Meyer concerned a state law that,

like §10-4, placed restrictions on who could circulate political petitions. In that case, the Court held that a state law making it a felony to pay petition circulators seeking the necessary signatures to place an initiative proposal on the general election ballot unconstitutionally burdened the right to free expression. 108 S.Ct. at 1895.

In so holding, this Court acknowledged that because petition circulation on state initiatives "involves the expression of a desire for political change and a discussion of the merits of the proposed change," it constituted "core political speech." 108 S.Ct. at 1891. The expression is no less important where, as in the present case, the petitions are circulated to qualify a political candidate for the ballot and

are intertwined with the inevitable discussion of the issues and concerns of the candidacy. Indeed, Petitioners concretely demonstrated at trial that, as in Meyer, political speech occurred during the circulation of Petitioners' nominating petitions.[5]

Nevertheless, in Moore III, acting without the benefit of Meyer, the Seventh Circuit rejected the proposition that limitations on a candidate's ability to circulate nominating petitions impose

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[5] Moore's platform promoted among other things legislation: to keep Cook County Hospital open; to eliminate the sales tax on food and medicine; to give public aid recipients a cost-of-living increase; to get back to basics in education; to fund more physical and mental health services; to place a moratorium on high-rise apartments; to limit the use of deadly force by police; and to create multi-purpose centers for senior citizens and the handicapped. (Tr. 28; R. 77, P. Ex. J.)

burdens on protected "core political speech" and that §10-4 restricts such speech in an impermissible manner and without sufficient justification. 845 F.2d at 146-48.

Rather than recognize the importance of Moore's speech, the Seventh Circuit concluded that "Section 10-4 simply does not regulate speech." 845 F.2d at 146. The court clearly viewed petition circulation not as political speech, but as a mechanical administrative task. Id.

In rejecting the idea that §10-4 imposes unduly burdensome requirements on speech, the Seventh Circuit disregarded the fact that §10-4, like the statute in Meyer, imposes limits on the "total quantum of speech." Yet, here, just as in Meyer, the government imposed limits on the number of voices which may convey

the candidate's political message. Particularly in a grass-roots campaign, this necessarily restricts the size of the audience a candidate such as Moore can reach. Meyer, 108 S.Ct. at 1892.[6]

Of equal importance, §10-4 lessened the chance that Moore could obtain sufficient signatures to obtain a place on the general election ballot, Tr. 28-

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[6] It is noteworthy that this restriction falls most heavily upon candidacies which represent minority and new party views which historically have been poorly financed. For example, Adlai Stevenson, III, used the "new party" vehicle to get on the ballot for the general election for Governor of Illinois as the new Solidarity Party candidate in 1986, after abandoning the Democratic Party nomination which he had in fact won. Having no reason whatsoever to doubt the lawfulness of the collection of signatures on his behalf to become the Solidarity candidate we may reasonably assume he found no necessity to depend on himself or his prior supporters/circulators to collect signatures a second time.

29, thus limiting the ability of Petitioners to make the party's platform the focus of further public discussion. Cf. Meyer, 108 S.Ct. at 1892.

2. Limitations on Core Political Speech Are Subject to Exacting Scrutiny.

Because the Seventh Circuit found that petition circulation is conduct and failed to recognize it as core political speech, as held in Meyer, the court applied an erroneous constitutional analysis.

Meyer requires that restrictions on political speech be examined with "exacting scrutiny." 108 S. Ct. at 1891. In the specific context of political speech by a candidate, this Court has held that this level of scrutiny mandates

that restrictions be "supported not only by a legitimate state interest, but a compelling one, and that the restriction operates without unnecessarily circumscribing protected expression." Brown v. Hartlage, 456 U.S. 45, 53-54 (1982).

In conflict with Meyer and Brown, the Seventh Circuit held that §10-4's limitation of circulation of election petitions was constitutionally permissible if "rationally justified." 845 F.2d at 146. While the court conceded that there was an "expressive consequence" to the "conduct" of petition circulation, id., purporting to rely on Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), it held that §10-4 need only be supported by a "legitimate and viewpoint-neutral

government interest." 845 F.2d at 147. Applying the wrong test in the first instance, and compounding that error by failing to recognize the speaker-based and content-based aspects of the prohibition, the court held §10-4 constitutional.

However, like the Colorado statute struck down in Meyer, §10-4 regulates both the content of the speech ("advance this candidacy by signing this petition") and the identity of the speaker (persons who previously circulated for a candidate of another political party).

The Seventh Circuit erroneously applied standards applicable only to the neutral regulation of conduct or of the time, place or manner of expression. This Court has validated time, place or manner regulations only where government

measures are not content-based. Boos v. Barry, ___ U.S. ___, 108 S. Ct. 1157, 1164 (1988). In the same vein, §10-4 is speaker-based because it prohibits circulation only by persons who have previously circulated. As in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), which struck down a restriction on corporate expenditures for referenda, the prohibition is keyed to the nature of the speaker and therefore clearly implicates First Amendment rights: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." Id. at 784-85. Although the statute at issue here does not seize upon the corporate form as

the basis of discrimination, the effect of the prohibition is similar.[7]

The court of appeals' assessment of the state's interests was similarly in conflict with Meyer and Brown.

Section 10-4's blatant and unwarranted infringement upon core political speech was held to be justified by the state's interest in preserving party structure and reducing

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[7] Even if §10-4 was content-neutral or speaker-neutral, the court failed to apply the requirement that government regulation of "conduct plus speech" be narrowly drawn to serve a substantial government interest. Clark, 468 U.S. at 294. Similarly, while the court made passing reference to the decision in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), suggesting §10-4 is a mere regulation of the manner of speech, it again failed fully to apply the applicable requirements of Heffron that the regulation be content-neutral and narrowly-tailored to serve a significant government interest.

factionalization. The court's reasoning was that §10-4 would discourage party splintering by deterring a new party candidacy by a person who had been a circulator for another party because that person would not be able to circulate on behalf of his own new party candidacy.

However, in the context of petition circulation by a qualified new party candidate, the interest in discouraging party-splintering is not sufficiently strong to justify prohibiting core political speech by a candidate. Moreover, that interest is not sufficiently served by such a prohibition.

In Storer v. Brown, 415 U.S. 724 (1974), this Court held that a State's asserted interest in discouraging party-splintering was "compelling" and

justified disaffiliation and sore loser provisions which denied ballot access to any independent candidate who had voted in a party primary or been registered as a member of a political party within one year prior to the immediate preceding election or who had been defeated in a party primary. However, this Court has never held that interest sufficient to justify handicapping candidates who have the right under state law to run for office by directly limiting their opportunities to speak to voters. Additionally, §10-4 does not serve an interest in discouraging party-splintering in the way a disaffiliation or sore loser statute would because once the candidate has already broken away from the party for whom he previously circulated petitions, the candidate's

circulation of nominating petitions causes no further rift.

In this same regard, it is also noteworthy that Illinois expressly allows persons who signed nominating petitions for established political parties to leave those parties after primaries by signing petitions to get new party candidates on the ballot. In view of this statutory scheme, party-splintering could be only superficially implicated by §10-4 and the state's interests not meaningfully served.

In Meyer, this Court found that the state's asserted interests of insuring grass roots support and protecting the integrity of the initiative process were not sufficient to justify the ban on paid circulators. 108 S. Ct. at 1894-95. The Court held that other existing laws

adequately protected these interests and that "the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. Id.

Similarly, in this case a presently existing sore-loser statute, Ill. Rev. Stat. ch. 46, §10-2 adequately protects the state's interests in discouraging party-splintering. To be sure, in this case, the state can hardly be found to have "demonstrated that it is necessary" to limit the core political speech of new party candidates to adequately serve its interests. Cf. Meyer, 108 S. Ct. at 1894.

3. The Availability of Alternative Means of Communication Does Not Cause Abridgements of Core Political Speech.

The Seventh Circuit gave little

credence to the extent of the burden on speech occasioned by §10-4 and minimized the significance of the burdens on Moore by indicating that under §10-4, anyone, a candidate or his supporters, could speak anywhere. They could, in the court's words, "stump the town, law or no." 845 F.2d at 147-48.

Moreover, the appellate court went so far as to suggest that Moore could circulate petitions, speak to voters and solicit their signatures on his petitions with the knowledge that those signatures would not be counted. 845 F.2d at 147. To suggest that the unconstitutional effect of §10-4 could be avoided by a candidate's fraudulent representations that he was qualified to collect voters' signatures is simply untenable either as a matter of constitutional doctrine or of

common sense.

The Seventh Circuit's conclusion that the burden on Moore's speech was minimal because of the availability of alternative means of communication was rejected by this Court in Meyer. Under the statute challenged in Meyer, the state initiative sponsors could have paid people to advocate their proposal in any manner except by the circulation of petitions. The Court held, however, that the freedom "to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection." 108 S. Ct. at 1893.

The Court pronounced that petition circulation is "the most effective, fundamental, and perhaps economical avenue of political discourse, direct

one-on-one communication." Id. In this context, the Court held that "[t]he First Amendment protects [individuals'] rights not only to advocate their cause but also to select what they believe to be the most effective means for so doing." Id.

Here a candidate for office was denied the most effective and direct means, the circulation process, for disseminating his political views and advocating his cause. While the Court of Appeals recognized this, it specifically held that the state could require the candidate to utilize less effective channels of communication. 845 F.2d at 147-48.

Review by this Court is counseled in this case because the Seventh Circuit's position in Moore III directly conflicts with this Court's decision in Meyer. If

the appellate court's application in this case of the well-established precedents underlying Meyer goes unreviewed, other new parties or their candidates and supporters in Illinois are likely to suffer the same fate as Petitioners. Section 10-4 substantially inhibits the free discourse of ideas in the electoral process and endangers the protections guaranteed by the First Amendment.

CONCLUSION

For the reasons set forth in this petition, the Court should issue a writ of certiorari to review the judgment and decision of the Seventh Circuit in this case or, in the alternative, grant summary reversal or grant the writ, vacate the lower court's opinions and remand this case for reconsideration by the appellate court in light of Meyer v.

Grant.

Respectfully submitted,

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APPENDIX A

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 18, 1988

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

CITIZENS FOR JOHN W. MOORE PARTY, JOHN W. MOORE and WILLIE ANDERSON,

Plaintiffs-Appellants,

No. 87-2171

vs.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 82 C 5901

WILLIAM T. HART, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-2171

CITIZENS FOR JOHN W. MOORE PARTY, et al.,

Plaintiffs-Appellants,

v.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 5901—William T. Hart, *Judge.*

ARGUED MARCH 29, 1988—DECIDED APRIL 18, 1988

Before CUMMINGS, FLAUM, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* John W. Moore and his political party contend that §10-4 of the Illinois Election Code, Ill. Rev. Stat. ch. 46 §10-4, violates the first amendment to the Constitution. Section 10-4 prevents anyone from collecting signatures on behalf of different parties during the same election season. It kept Moore out of the race for the Illinois House of Representatives in 1982, because Moore first qualified for and then withdrew from a primary election in the Democratic Party before forming the Citizens for John W. Moore Party and using the same people (including himself) to collect signatures to

qualify for the ballot in the general election. When last the case was here, we held that §10-4 is constitutional as applied to Moore's supporters but remanded for further proceedings to address the application of §10-4 to Moore as the candidate. 794 F.2d 1254 (1986). The district court concluded that §10-4 is a slight burden on the candidate's ability to run for office and satisfies all constitutional standards. 665 F. Supp. 1334 (N.D. Ill. 1987).

The plaintiffs' initial attack on §10-4 was that the statute infringed the freedom of political association. Although we rejected this contention, we remanded the case because we were concerned that the application of §10-4 to candidates might affect the freedom of speech of the candidate. 794 F.2d at 1263. We contemplated that the parties would introduce additional evidence showing the effect of §10-4 on the speech of candidates in general and making concrete the justifications for (or adverse effects of) the statute. No one offered such evidence, however, and both sides have continued to address their attention more to freedom of political association than to freedom of speech. The district court's opinion on remand followed this lead.

As a freedom-of-association claim Moore's case already is over, for the reasons given in our earlier opinion. Section 10-4 is a middle ground between "sore loser" and "disaffiliation" statutes of a sort the Supreme Court sustained in *Storer v. Brown*, 415 U.S. 724, 733-36 (1974), on the one hand, and entirely open competition, on the other. Section 10-2 of the Illinois Election Code, a sore loser statute, provides that the loser in a primary election cannot run in the next general election. Section 10-2 did not bar Moore from running in the general election because he quit the primary before he could lose it. Section 10-4 then imposed a lesser sanction: Moore could run, but only if he could attract a new group of petition circulators to get the signatures necessary to qualify for the ballot.[1] Be-

[1] Section 10-4 applies to persons who did not run for office in the primary but simply circulated petitions on behalf of a candi-

(Footnote continued on following page)

cause Moore had been a circulator in his primary campaign, he had to find a person to replace his own services as circulator. The incremental burden of finding one extra circulator (beyond those needed to replace the non-candidate circulators) is slight. As Moore observes, the gain (preserving the party structure and reducing factionalization by increasing its cost) is correspondingly slight, but the Constitution does not insist that the government accomplish a lot by each enactment. As our prior opinion stressed, the proper inquiry is into the ratio between benefit and burden. We remarked before that Moore could have been excluded from the ballot by a sore loser statute. 794 F.2d at 1258-59, 1261-62. Whenever a state takes a more tempered course, it may face the challenge that the less ambitious statute achieves too little to be valid. We rejected that argument before, and we see no reason to change our view.

The argument based on freedom of expression requires a different analysis, however. Moore wants to convey the message that he is a "grass roots" candidate, one willing to do his own work. He believes that §10-4 interferes with his ability to communicate this message because it prevents him from carrying his own petitions. *Buckley v. Valeo*, 424 U.S. 1, 51-54 (1976), holds that the government may not interfere with a candidate's expenditures on his own behalf, even though it may regulate contributions to his cause; similarly, Moore contends, the govern-

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[1] *continued*

date of a different party, or an independent candidate, and who later decide to run themselves. Therefore, Moore argues, §10-4 is not a rational method of "raising the price" of running under different party banners in the same election season. Yet Moore ran in the Democratic Party's primary and did not offer to show that this application of §10-4 reaches a significant number of persons, or that if such persons exist they have encountered trouble qualifying for the ballot in the general election. We therefore leave for another day any questions that could be raised about the application of §10-4 to signatures collected by a candidate running for the first time in the general election.

ment may not interfere with how a candidate chooses to spread his message, even though it may regulate the conduct of supporters. Moreover, the ban of §10-4 falls with special force on impecunious candidates (who find it easier to "hire" their own time than to hire professional circulators) and on candidates with a particular message. Cf. *Brown v. Hartlage*, 456 U.S. 45 (1982). A candidate's message is more credible if he acts on his beliefs. A candidate whose platform was "Support the Fat Cats" would not want to circulate his own petitions and could send his "message" by hiring lackeys. This viewpoint-based effect makes the statute unconstitutional, the argument concludes.

This is an alluring but ultimately unsuccessful line of argument. Section 10-4 simply does not regulate speech. First, it attaches a consequence to running in a primary election and leaves unfettered those who did not.[2] *Buckley* observed that the government may attach rationally-justified consequences to voluntary conduct, even though the consequences would be unconstitutional if imposed independently. See 424 U.S. at 57 n.65 (holding that a candidate who accepts public funds may be forbidden to exceed the spending limits, even though unlimited spending otherwise is a constitutional right). Second, §10-4 regulates conduct, the collection of signatures. True, the conduct has an expressive consequence, but so too did sleeping in the park, the subject of *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). The message in question (that the homeless have no place to go and need governmental assistance) was linked to the conduct, just as Moore's message may be linked to his—and the message also was one that could not readily be conveyed by other means. The poor could not convey the same message by renting hotel rooms, just as Moore could not convey the same message by hiring professional solicitors; and sleeping in the park may have been an uncommonly

[2] Subject to the qualification in footnote 1, above.

effective way to send a particular message. Still, a legitimate and viewpoint-neutral governmental interest in regulating the conduct is sufficient. In *Clark* the government forbade sleeping in the park no matter the message, indeed no matter whether there was a message. Illinois forbids circulating petitions for two parties no matter the message, indeed no matter whether there is a message.

Undoubtedly the rule affects the Citizens for John W. Moore Party differently from the Fat Cat Party, because the candidate of the Fat Cat Party[3] would not want to (and could not) use the act of collecting signatures on his own behalf as a part of his message, but the government need not regulate in a way that reflects the different messages that may be attached to the same conduct. See *United States v. O'Brien*, 391 U.S. 367 (1968). The obligation of the government is to be viewpoint-neutral, and to be content-neutral in all but the rarest cases. *Boos v. Barry*, 56 U.S.L.W. 4254, 4256-57 (U.S. Mar. 22, 1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327-30 (7th Cir. 1985), affirmed, 475 U.S. 1001 (1986). *Brown v. Hartlage* dealt with a viewpoint-based regulation of speech: the statute (which the Court held unconstitutional) forbade a candidate to pledge to reduce his own salary.

Section 10-4 regulates conduct, and it is both viewpoint-neutral and content-neutral. It escapes the fate of the statute in *Brown*. Section 10-4 does not affect Moore's speech. He can go wherever he wants and say anything he likes. Neither his method nor his message matters. He can even circulate all the petitions he wants and collect all the signatures he likes; they just won't count toward the number needed to get him a place on the ballot. Having a different message would not avoid the application of §10-4. The state's regulation no more stops Moore from speaking than would the lack of a need to gather signa-

[3] On the first amendment rights of cats, fat or otherwise, see *Miles v. City Council of Augusta*, 710 F.2d 1542 (11th Cir. 1983).

tures. Suppose Moore had stuck to his guns in the primary and prevailed. He would then have been on the ballot for the general election without the need to gather more signatures. Could he contest this rule by saying that he had been forbidden (by the irrelevance of signatures) to convey the message that he was willing to do his own work? Whether the state makes signatures unnecessary or requires someone other than the candidate to gather them, the effect on speech is the same.

The regulation of signature collection is not different in principle from the many other speech-plus-action cases. Take, for example, *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), which involved the delivery of a message plus the solicitation of contributions at county fairs. The state allowed an unhindered delivery of the message but required the solicitation to take place at booths, and the Court sustained the statute as supported by a legitimate governmental interest. We have concluded that there is a legitimate interest behind §10-4, and its application to candidates then follows as the application of the booth requirement did in *Heffron*. The Krishnas said that solicitation on-the-spot would make the message (and the religious movement) more effective, just as Moore says that personal solicitation of a signature would make his message and movement more effective, but his argument is no stronger than the Krishnas'.

There is also no good reason to differentiate the candidate from his supporters for purposes of freedom of expression. Section 10-4 affects candidates and supporters identically. Anyone (including Moore) may stump the town, law or no; anyone (including Moore) may collect a signature only if he has avoided playing the same role for another party during the election season.[4] Each of Moore's supporters has the same constitutional right of speech as

[4] Whether Moore may stump *with* a supporter who collects and certifies signatures, as the State Board of Election Commissioners contends, is a question of state law unimportant to our disposition.

Moore, and each may have the same interest in spreading Moore's message and making the campaign succeed. We could not find a case holding that candidates possess greater rights to speak than do supporters; candidacy is just an occasion for the exercise of a right to speak that everyone possesses, and it is not a reason to enlarge the right of speech. The differences seem to run the other way. After a candidate accepts public funding and suffers a restriction of his own right to speak, independent supporters still may speak and spend to their hearts' content. E.g., *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985). Resign-to-run, sore loser, and disaffiliation statutes affect only the candidates. See *Storer* and, e.g., *Clements v. Fashing*, 457 U.S. 957 (1982) (sustaining a resign-to-run statute).

In the end, §10-4 injures Moore in his quest to be a candidate and not in his role as speaker, and there is no fundamental right to be a candidate. *Clements*, 457 U.S. at 963. Section 10-4 is simply a less restrictive alternative to a permissible sore loser statute, one that would keep out of the general election everyone who enters a primary and does not win. One can lose a primary by withdrawing in the face of defeat, as well as by sticking in to the bitter end. The interest in resolving disputes through party channels and preventing the proliferation of factions is no less in one case than in the other. Moore withdrew in the face of defeat, 665 F. Supp. at 1337, and Illinois could have barred him from making another run. This would have stifled both political association and speech more effectively than §10-4. Instead of prohibiting Moore from making a second try, Illinois simply required him to show extra support by attracting a new group of circulators, a group large enough to replace his services (as a circulator) in addition to the services of his other circulators. This is less effective in preventing fissiparous conduct, but much less restrictive as well. If we were to accept Moore's invitation to hold §10-4 invalid, that might induce Illinois to make §10-2 broader. The cause of speech would not gain from such a trade.

AFFIRMED

No. 87-2171

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITIZENS FOR JOHN W. MOORE PARTY, *et al.*,
Plaintiffs,

v.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, *et al.*,
Defendants.

No. 82 C 5901

MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In prior proceedings this court considered the constitutionality of a provision of the Illinois Election Code, Ill. Rev. Stat. 1981, ch. 46 ¶ 10-4, which provides, in part, that "no person shall circulate or certify petitions for candidates of more than one political party, or for an independent candidate or candidates in addition to one political party, to be voted upon at the next primary or general election." This provision resulted in the exclusion from the ballot of plaintiff John W. Moore as the candidate of the Citizens for John W. Moore Party in the 1982 general election for members of the Illinois General Assembly. After a trial it was held that (1) the Election Code section does not violate the Equal Protection of the Laws Clause of the Fourteenth Amendment on the theory that it is applicable only to new political parties and independent candidates, because it is not so limited, and (2) the provision did not violate plaintiffs' First Amendment speech, association or ballot access rights. *Citizens for John W. Moore Party v. Bd. of Election*, 599 F. Supp. 662 (N.D. Ill. 1984).

On appeal, the United States Court of Appeals for the Seventh Circuit, one judge dissenting, certified to the Illinois Supreme Court the question whether the statute applies "to signatures gathered by candidates for office?" *Citizens for John W. Moore v. Bd. of Elect. Com'rs*, 781 F.2d 581 (7th Cir. 1986) ("*Moore I*"). The Illinois Supreme Court declined to answer the certified question. *Citizens for John W. Moore v. Bd. of Election*, 94 Ill. Dec. 69, 487 N.E.2d 946 (1986). Thereafter, the Court of Appeals held that the statute was constitutional as it applied to non-candidate circulators. The Court of Appeals remanded the case for a "focused" First Amendment consideration of the application of the statute "to candidates as circulators." *Citizens for John W. Moore v. Bd. of Elec. Com'rs*, 794 F.2d 1254 (7th Cir. 1986) ("*Moore II*").

In *Moore II*, the Court of Appeals states:

> On remand the district judge may determine that candidates and non-candidate circulators have materially identical first amendment interests and that, despite the different roles they play in the electoral process, both are subject to the state's proffered justifications. Or he may hold that Moore the candidate failed to carry his burden in this regard. On the other hand, he could decide that the justifications offered for § 10-4, as applied to candidate circulators, are inadequate or nonsensical. The record might support any of these conclusions. The district court should make them first, and there will be an occasion for appellate review later.

781 F.2d at 1263.

At a status hearing after remand this court posed the following questions in order to obtain any additional information concerning the burdens and justification of the statute:

(1) How many circulators where there in each of the campaign efforts by Moore?

(2) How many were the same?

(3) How long did it take to collect the signatures each time?

(4) What is the geographical size of the districts?

(5) Why were the signatures invalidated?

(6) Who gathered the invalidated signatures?

Some of the information sought is contained in the record. Some is not. Neither party sought to present additional evidence.

I.
FINDINGS OF FACT

For the purpose of this proceeding on remand the uncontested facts set forth in the original final pretrial order are again adopted as findings of fact. (Paragraphs 1-36 of the original findings of fact are reported at 599 F. Supp. 664-668).

Based on the testimony and exhibits submitted at the previous trial and for the purpose of this proceeding on remand the court finds as follows:

37. Plaintiff Moore was identified with the Democratic Party prior to the formation of the Citizens for John W. Moore Party. He unsuccessfully ran in the 1980 Democratic Party primary for the office of state representative in the Illinois General Assembly.

38. In 1982 Illinois was divided into legislative districts for the election of 59 senators and representative districts for the election of 118 representatives. Each legislative district contained two representative districts.[1] The legislative and representative districts here involved are the 16th Legislative District and the 31st Representative

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[1] *See Citizens Party v. Ill. State Bd. of Elections*, 546 F. Supp. 1050, 1052 (N.D. Ill. 1982) for a history of the composition of the legislature and voter-signature nominating requirements.

District. The 31st Representative District is contained within the 16th Legislative District. The districts are in the Englewood Community area of the City of Chicago, Illinois, a compact urban area.

39. Prior to March 16, 1982, Moore and a partially identified group of circulators gathered signatures for petitions to place him on the Democratic Party primary ballot for the office of state senator, 16th Legislative District.

40. One of the primary petitions subscribed on January 20, 1982 reads, in part, as follows:

> We, the undersigned members of and affiliated with the Democratic Party and qualified electors of the Democratic Party in the 16th Legislative District of the State of Illinois, do hereby petition that John W. Moore, who resides at 5917 S. Throop St. in the City of Chicago Zip Code 60636, County of Cook and State of Illinois, shall be a candidate of the Democratic Party for the nomination for the office of State Senator of the State of Illinois, for the 16th Legislative District to be voted for at the primary election to be held on the 16th day of March A.D. 1982.
>
> [25 lines for signatures and addresses]
>
> The petition contains the following certificate:
>
> I John W. Moore hereby certify that I am a registered voter of the political division for which the candidate is seeking nomination, that I reside at 5917 S. Throop Street, City of Chicago, County of Cook, 16th Legislative District in the State of Illinois, and that the signatures on this sheet were signed in my presence and are genuine to the best of my knowledge and belief and the persons so signing were at the time of signing the petition, qualified voters of the Democratic Party, residing in the 16th Legislative District, and that their respective residences are currently stated as above set forth.

41. Moore and his supporters obtained 1,000 signatures to place his name on the primary ballot.

42. Moore withdrew from the Democratic Primary during February 1982. He testified as to his reasons for withdrawal from the Primary contest as follows:

> Well, I came under – I withdrew, I withdrew my candidacy at that time because we were under severe pressure and the people that supported me felt that it would be more practical for us to run later on in the general election where I could be one on one against the regular party candidate rather than coming up under the opposition of two strong candidates who had tremendous resources in terms of money and manpower.
>
> * * *
>
> Well, as I told you before, it came from the regular Democratic Party opponents that I had in the person of Mr. Charles Chew, who was the incumbent State Senator who had recently been – you know, who was Senator in one district and came into that district somewhat unexpectedly, because we had not expected – the people in the community and the district who had worked with me and supported me were expecting Mr. James C. Taylor to run again for office because he was the incumbent in our District. He decided not to run again. He knew that we had major opposition to his candidacy and his office, so instead they brought Mr. Charles Chew in there at the last minute, and then there was a battle seemingly in the regular Democratic Party itself, because Committeeman Bill Parker felt that he could sponsor his own candidate in the person of Mr. Jewel Frison. They had all kinds of precinct workers, they had X number of dollars and they even told me personally that, you know, they would do everything within their power. There was no way that they felt I could win the election in there because they would throw everything at me, all their weight financially as well as manpower, and based upon those factors and coming directly from them as well, we stated that, okay, this is – you know, this is foolish for me to continue an effort

to win in the primary under that type of pressure, is I withdrew as a candidate, and those are the reasons why I withdrew. You asked me why, what type of severe pressure. I am telling you what that pressure was.

43. Moore testified that his race for the General Assembly in the 31st Representative District was part of his opposition to the regular Democratic Party, stating as follows:

Q. Why did you decide to run for a State Representative?

A. Because people encouraged me to do so. They felt it was the most practical thing to do under the circumstances, that we still had the basic problems, the same basic needs, I still had the same platform, that we would move on to try to field a candidate, myself, who would represent the best interests of the people in our community.

44. Moore withdrew from the Democratic Primary to run against another Democratic nominee in the general election when he would be "one on one" in opposition to the Democratic nominee for state representative. He did not believe that he could overcome the party opposition to his candidacy for Democratic nominee for state senator.

45. Moore and his group of supporters began to circulate petitions for nomination to form a new political party in order to place his name on the ballot as a candidate for the office of member of the General Assembly 31st District in July 1982. The petition states:

We, the undersigned, qualified voters of the 31st Representative District of the State of Illinois, do declare that it is our intention to form a new political party in the political division aforesaid, to be known and designated as the Citizens for John W. Moore Party, and do hereby petition that the following named person shall be a candidate for the office hereinafter specified, to be voted at the General Election to be held on November 2, 1982.

C 7

A COMPLETE SLATE IS HEREBY PRESENTED

NAME OF CANDIDATE	John W. Moore
OFFICE	State Representative 31st District
ADDRESS-ZIP CODE	5917 S. Throop Street Chicago, Illinois 60636

[Spaces for 20 signatures and addresses]

I, John W. Moore, do hereby certify that I am a registered voter of the political division for which the candidate is seeking election, that I reside at No. 5917 S. Throop street, in the City of Chicago, County of Cook, in the State of Illinois, and that the signatures on this sheet were signed in my presence, and are genuine, and that to the best of my knowledge and belief the persons so signing were at the time of signing the petition registered voters of the political division in which the candidate is seeking election, and that their respective residences are correctly stated, as above set forth.

46. Some of the same persons who signed Moore's petition for the Democratic primary also were approached and signed his petition for the general election as members of Citizens for John W. Moore Party.

47. Kimberly Tines circulated petitions on Moore's behalf in both the primary and the general election. She considered herself to be a democrat at the time of the 1982 primary election and previously voted as a democrat. She asked voters who signed primary nominating petitions if they were Democrats. She testified that the persons she approached a second time on behalf of Moore as a Moore Party candidate were not confused.

48. Tines testified that circulators were motivated by Moore's circulation of petitions and his active interest in the work of his campaign.

49. Moore testified that he had approximately six cir-

culators including himself, his wife, Romeo Harrison, Kimberly Tines, Alice Bell and a few others. The record does not show who actually collected which signatures in each campaign except that Moore collected 975 signatures on behalf of his Moore Party candidacy.

50. Plaintiffs filed 3,829 signatures in support of Moore's petition for a place on the general election ballot. Objections were filed to Moore's gathering of 975 signatures. No other objections were filed as to other circulators. The Board allowed unchallenged objections to other signatures. The Board sustained objections to a total of 2,468 signatures including those gathered by Moore, resulting in a total of 1,361 valid signatures or 139 short of the 1,500 signatures required.

51. Moore testified that without his own circulation efforts he could not obtain the requisite signatures for a place on the ballot, and that his direct communication with the voters was an important aspect to the success of his "grass roots" campaign.

II.
Opinion and Conclusions of Law

The lucid opinions of the Court of Appeals focus the issues which must be resolved. In *Moore I* the Court of Appeals stated its concern to be "whether the statute directly interferes with the candidate's ability to communicate with voters." The Court of Appeals stated that the resolution of this question bore upon (1) the state interest in insisting that intra-party competition be settled before the general election to avoid factionalism and party splintering; (2) the state interest in avoiding election abuse; and (3) the state interest in preventing voter confusion. 781 F.2d at 582.

The Court of Appeals opinion in *Moore II* provides significant guidance for the analysis of the competing interests. Four patterns in Supreme Court decisions were deemed important. *Moore II* describes the patterns as

follows:

> The most recent decision of the Supreme Court suggests that courts should avoid putting decisions in terms of a "standard of scrutiny." *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L.Ed.2d 547 (1983), instructs lower courts to "consider the character and magnitude of the asserted injury to the rights protected" by the constitution, to "identify and evaluate the precise interests put forth by the State", and then to decide whether the interests justify the restriction. The decision is functional, not turning on the form of words, and we have therefore held it important to follow what the Supreme Court does rather than attempt to articulate any formal methodology. *See Hall v. Simcox*, 766 F.2d 1171, 1174 (7th Cir.), *cert. denied*, ____U.S. ____, 106 S.Ct. 528, 88 L.Ed.2d 459 (1985). *See also Dart v. Brown*, 717 F.2d 1491, 1498-1504 (5th Cir. 1983), *cert. denied*, ____U.S. ____, 105 S.Ct. 105, 83 L.Ed.2d 49 (1984). Here as in *Hall*, we start by identifying the important patterns in what the Court does.
>
> 1. The Court does not demand that the state prove at trial an empirical basis for its judgment that the regulation in question is useful. It will accept a logical justification....
>
> [A]ll of the cases about the regulation of elections from *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), through *Anderson* ask only whether the state's justification is logically sound and consonant with common experience. The Court accepts justifications such as "maintaining the integrity of the various routes to the ballot" *(American Party*, 415 U.S. at 782 n.14, 94 S.Ct. at 1307 n. 14) as "compelling" (*ibid.*) without proof that a given number of candidates is "too confusing" or that a particular statute does (or does not) have an identified effect on the number of candidates. *See Hall v. Simcox, supra.*
>
> The sorts of interests states assert to justify reg-

ulation of elections often cannot be reduced to proof.... The Court has allowed states to justify regulation of elections with logical rather than empirical support in order to preserve the fundamentally political character of these choices.

... We require of Illinois a logical justification for § 10-4, the real justification and not a front for more sinister objectives, even though we do not insist on evidence establishing how the statue achieves its objectives....

2. Several cases say that the state should select the "least restrictive alternative" when regulating elections.... The Court has not used a "least restrictive means" test to under cut the more tolerant approach we have outlined above....

The point of looking at alternative methods of regulation is that the state must justify each incremental restriction in light of its incremental benefits....

3. A court may study the workings of a statute either in the large (how it influences the conduct of people in general) or in the small (how it applies to the plaintiff). One common line of argument in cases under the first amendment is that the state must justify not only the usual application of the rule but also the nature of the effects on (and the possibility of an exception for) the plaintiff. Ballot-access cases like this one are first amendment cases (see *Anderson*, 460 U.S. at 786-88 & n.7, 103 S.Ct. at 1568-69 & n.7) so that in order to decide whether to examine the systematic effects of the statute or the effects on Moore in particular, we must consider the evolution of first amendment doctrine....

... The question today is whether the *rule* is adequately justified, not whether the plaintiff's case is a paradigm for application of the rule or whether the law would fail if the plaintiff were treated differently.... We must ... inquire how § 10-4 usually operates, not how it affected Moore.

4. One variant of the argument that § 10-4 is both overbroad (as applied to Moore) and under-

> inclusive (because it does not pursue to the hilt the interests the state asserts on its behalf) is a contention that the statute is not part of a comprehensive plan. Indeed it is not. It is an occasional piece of legislation. Moore invites us to judge it harshly as a result. But *Clements*, which applied the step-at-a-time doctrine to legislation affecting elections, is sufficient reply. The constitution does not require a state to adopt comprehensive plans or none at all. It is enough if the law the state adopts serves permissible purposes....

794 F.2d at 1257-59 (citations omitted).

The first step in the analysis is to assess the burden § 10-4 imposes on the protected First Amendment speech, association and ballot access interests of a candidate circulator. The provision is not an absolute ban on ballot access but its application prevents Moore from participating in one important step in a second effort to be elected to office in the same primary and general election period. The gathering of 1,500 voter signatures is a vital separate step in this activity. A campaign worker testified that the morale of the circulators is also involved.

How great then is the burden on the candidate's right to associate with and speak directly to voters? The Board argues that Moore was permitted to accompany other circulators in a person to person canvass for signatures. Would he be required to remain silent in order to comply with the statute? The spectre of a mute candidate is a contradiction. Defendants argue he could speak so long as he did not perform any certifying function. This novel interpretation of § 10-4 has not previously been suggested, is of doubtful practical application, and finds no support in Illinois case law interpreting § 10-4. The Illinois courts construing § 10-4 appear to hold that the same person circulating the petitions must perform the certifying function. *Fortas v. Dixon*, 122 Ill.App.3d 697, 462 N.E.2d 615, 617, 78 Ill. Dec. 496, 498 (1st Dist. 1984).

The extent of the speech burden imposed upon a can-

didate circulator must be viewed by the effect on his total campaign of being precluded from speaking to persons while they are asked to sign his nominating petitions. While this may be an element of a grass roots campaign, it cannot be judged on this record as the usual candidate's sole or most important speech activity. The ban does not operate on all speech. The candidate is not limited in his speech to those signing his petitions except when seeking their formal endorsement of his petitions. The candidate's speech to these persons in every other aspect of the campaign is unlimited and will presumably constitute the greatest part of a campaign effort.

The limitation here imposed is unlike the total voter association ban recently struck down in *Tashjian v. Republican Party of Connecticut*, ____U.S. ____, 107 S.ct. 554 (1986), or the total disqualification struck down because of the candidate's speech in *Brown v. Hartlage*, 456 U.S. 45 (1982).

Illinois has now adopted a narrow "sore loser" statute, the effect of which to limit persons from being candidates in both the primary and general election. Only in a case such as this, when a candidate circulator actually withdraws from the primary and then refiles for the general election, would the bar of the statute prevent the candidate from circulating his own petitions. Noting this change, the Court of Appeals stated that "the new sore loser statute diminishes the adverse incremental effects of § 10-4." *Moore II*, 794 F.2d at 1262, n.2.

The ballot access burden as reflected by the facts in this case is that without Moore's 975 gathered signatures and with other signatures invalidated for other undisclosed reasons (which may not be unusual), Moore fell 139 signatures short of obtaining a place on the general election ballot. Although Moore apparently told the Court of Appeals at oral argument that some of the 1,361 valid signatures were obtained by dual circulators and also vulner-

able (*Moore I*, 781 F.2d at 585), those facts were not proven before this court either initially or on remand. The extent of the burden on access to the ballot appears to be the effort necessary to obtain 139 additional valid signatures or less than 4% more than the number gathered. This does not demonstrate a heavy burden.

The motivation or morale of circulators – important in any campaign – was also given as a reason for Moore's participation in the petition drive. Disqualification prevents joint efforts. The burden does not appear, however, to be a speech or association limitation of the same order as a bar to contact with voters. Association with circulators is not prevented even if limited. Inspiration of campaign workers is not a protected activity. The First Amendment implications are indirect at best.

The first justification advanced for the application of the statute by the state is as a measure to avoid factionalism and party splintering. The facts in this case tend to indicate that Moore, a Democrat, saw defeat facing his effort to become the Democratic party nominee for State Senator in the Englewood area, so he withdrew to contest the Democratic party's nominee for state representative in the same area, in the general election. This conduct is illustrative of factionalism and splintering continuing from a primary to a general election. While § 10-4 may not be the most effective measure to limit such activity it is not fanciful to regard it as one means in a total election code designed to discourage continuing primary disputes into the general election. This aspect of the case does not change when the petitions are in the hands of the candidate circulator.

The possibility that "dirty tricks" or "abuse" of the kind explained in *Moore II*, 794 F.2d at 1261, will occur when petitions are circulated by the candidate seems remote. The candidate circulator facing the voter in a grass roots campaign would find it difficult to misrepresent the

reasons for his candidacy. Raiding efforts do not seem feasible in person to person efforts by a new small party candidate in the general election. Defendants do not attempt to explain how Moore's individual effort could lead to campaign abuse.

Voter confusion is not entirely eliminated by the presentation of petitions by the candidate circulator. As this case illustrates, Moore initially sought nomination support from registered voters who were affiliated with the Democratic Party. Later in the election period he returned to some of the same voters with his petition for another office and asked some of the same registered voters who had described themselves as Democrats to petition for ballot position as members of the Citizens for John W. Moore Party. It may be that the candidate circulator can explain his position so well that the former Democratic party members do follow him into a new party, but the possibility for confusion is not insignificant, even if reduced by the communication of the candidate.

Having identified what appear to be the speech, association and ballot access burdens imposed on the candidate circulator and considering the justifications advanced by the defendants for the imposition of the restriction on a candidate circulator, it is concluded that plaintiffs have failed to prove that the First Amendment burdens are sufficient to warrant a conclusion that the statute, as applied to candidate circulators, is unconstitutional. The position of Moore is as described in *Moore I*, 781 F.2d at 588:

> The Supreme Court has repeatedly upheld restrictions on candidates' activities more onerous than those contained in § 10-4. *See Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (state may enact disaffiliation and sore loser statutes that lock a candidate into a political party for a year and forbid running in general election after losing in a primary); *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d

508 (1982) (state may enact rule requiring a public official to resign from office in order to be a candidate for a different office.). *Cf. Rosario v. Rockfeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.E.2d 1 (1973) (state may require a voter to select a single political party and make the election binding for one electoral season); *American Party of Texas v. White*, 415 U.S. 767, 781, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974) (a state "may insist that intraparty competition be settled before the general election"). The Court reached these conclusions using a "strict scrutiny" approach, from which it has since retreated. *See Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564; 1570, 75 L.Ed.2d 547 (1983); *Hall v. Simcox*, 766 F.2d 1171, 1174 (7th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 528, 88 L.Ed.2d ____(1985); *Dart v. Brown*, 717 F.2d 1491, 1498-1504 (5th Cir. 1983), *cert. denied*, ____U.S. ____, 105 S.Ct. 105, 83 L.Ed.2d 49 (1984).

Section 10-4 is a good deal less restrictive than a disaffiliation statute or resign-to-run statute. These statutes impose large costs on running or make any change of party lines impossible. Section 10-4, by contrast, imposes a modest cost on changing parties during an election season. A person who remains in the same party may use one group of solicitors to obtain signatures for as many offices as he seeks. A person who changes parties will need another group of people to circulate petitions. The relative disadvantage that § 10-4 imposes on dual-party candidates does not affect the total number of signatures the candidate must obtain. Moore needed 600 signatures to get on the primary ballot for the senate, and he needed 1,500 to get on the general election ballot for the house whether or not he switched parties. Section 10-4 does not affect the number of signatures needed and therefore does not affect the number of circulator-hours needed to obtain the signatures. It affects only the identity of those who circulate petitions. A candidate who switches parties during an election campaign must

demonstrate a somewhat broader base of support by being able to attract a new group of circulators.

The state's justifications for § 10-4 may not apply as forcefully to candidates as to other circulators, but the Court has never required a perfect fit between justification and application.

IT IS THEREFORE ORDERED as follows:

On remand the court finds the contested issues of fact and law in favor of defendants and against plaintiffs and dismisses this case with prejudice and with costs to defendants.

ENTER:

/s/ WILLIAM T. HART
UNITED STATES DISTRICT JUDGE

Dated: June 24, 1987

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1012

CITIZENS FOR JOHN W. MOORE PARTY, et al.,

Plaintiffs-Appellants,

v.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 5901—William T. Hart, *Judge.*

ARGUED SEPTEMBER 12, 1985—
QUESTION CERTIFIED JANUARY 13, 1986
SUBMITTED JANUARY 29, 1986—DECIDED JULY 8, 1986

Before COFFEY, EASTERBROOK, and RIPPLE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* John W. Moore and some of his friends circulated petitions that put him on the ballot of a primary election in March 1982; Moore sought nomination as the Democratic Party's candidate for state senator from the 16th senatorial district. Although Moore qualified for the ballot, he withdrew before the election. Then Moore and essentially the same group of friends formed the "Citizens for John W. Moore Party" and collected signatures to place Moore on the ballot

for the general election in November 1982 as a candidate for the Illinois House of Representatives in the 31st house district. Moore collected 3,829 signatures; he needed 1,500 valid signatures to qualify.

The Board of Election Commissioners threw out 1,493 signatures for reasons Moore does not challenge and another 975 because Moore himself had collected them, leaving Moore 139 signatures short. (Moore told us at oral argument that almost all of the Moore Party's signatures are invalid under §10-4, although only Moore's were challenged.) The Board set aside the signatures Moore had collected because the Moore Party was the second party for which Moore had solicited signatures in the 1982 election season—the Democratic Party being the first. The Board concluded that these signatures did not count, citing §10-4 of the Illinois Election Code, Ill. Rev. Stat. ch. 46 §10-4, which provides: "[N]o person shall circulate or certify petitions for candidates of more than one political party . . . to be voted upon at the next primary or general election." Moore and his allies simply were unaware of §10-4, and therefore they did not try to collect signatures with the aid of people who had not circulated petitions for another party.

Moore contends that §10-4 is unconstitutional. The district court denied Moore's request for an injunction that would have put him on the ballot in 1982. The case is not moot, however. See *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). The district court held a trial on Moore's request for a declaratory judgment. The court heard from expert witnesses who both explained the genesis of the statute and gave differing versions of its effects. The court concluded that §10-4 reduces the confusion that may occur if circulators switch sides in the same campaign. It also helps keep intra-party squabbles within the party by discouraging people who have participated in a primary from running as candidates of new parties. 599 F. Supp. 662 (N.D. Ill. 1984).

The court conceded that the statute affects rights secured by the first and fourteenth amendments but found the effect small. Moore came within 139 votes of success even though ignorant of the rule, and the "evidence does not prove that there was a shortage of circulators or that the burden imposed outweighs the statutory objectives and benefits." 599 F. Supp. at 670. Although the court thought "strict scrutiny" unnecessary, it held that because the "statute did not prevent Moore's candidacy" (*ibid.*) and the state's objectives are substantial the statute would survive such scrutiny. It concluded: "The statute requires that circulators make a choice of political parties and remain with that party or independent candidate throughout an election. This is not an unconstitutional burden." *Ibid.*

After we heard oral argument, we certified to the Supreme Court of Illinois the question whether "person," within the meaning of §10-4, includes a candidate soliciting signatures on his own behalf. 781 F.2d 581 (7th Cir. 1986). On January 23, 1986, the Supreme Court of Illinois entered an order declining to answer this question of law. We therefore proceed to decision on the assumption that "any person" includes Moore—an assumption the parties, the Board, and the district court share. This treatment does not imply, however, that the constitutional analysis of candidate-circulators and other circulators is identical. We discuss this difference in Part IV.

I

The principal effect of §10-4 is to make it harder for someone to run on two party lines during the same election season or to defect from a party and run as an independent. A person who remains in the same party may use one group of solicitors to obtain signatures for as many offices as he seeks, in primary and general elections. A person who changes parties or switches from a party to an independent candidacy will need to attract another group of people to circulate petitions.

Although §10-4 creates this relative disadvantage, it does not affect the total number of signatures the candidate must solicit. Moore needed 600 signatures to get on the primary ballot for the senate, and he needed 1,500 to get on the general election ballot for the house whether or not he switched parties. Section 10-4 does not affect the number of signatures needed and therefore does not affect the number of circulator-hours needed to obtain the signatures. It affects only the identity of those who circulate petitions. A candidate who switches parties in an election campaign must demonstrate a somewhat broader base of support by being able to attract a new group of circulators.

Moore pins his principal hopes on persuading us to apply an elevated standard of scrutiny to §10-4. He argues that the statute should be subjected to strict scrutiny and held unconstitutional because not sufficiently well tailored to its ends and because the state did not introduce at trial evidence proving that it achieves its objectives. Failing that, Moore would settle for some intermediate level of scrutiny.

Moore does not want for cases, some in the Supreme Court and many in the lower courts, that have applied strict scrutiny to laws restricting access to the ballot. These cases reason that laws controlling access affect rights of both speech and association, hence the need for extraordinary scrutiny. Paradoxically, some of the cases announcing the most rigorous scrutiny also sustain the most onerous statutes. See *Storer* v. *Brown*, 415 U.S. 724 (1974); and *American Party of Texas* v. *White*, 415 U.S. 767 (1974), two cases to which we return.

The defendants do not want for cases applying quite relaxed scrutiny to statutes affecting candidates' right to run. For example, *Clements* v. *Fashing*, 457 U.S. 957, 969-70 (1982) (plurality opinion), applies the step-at-a-time doctrine to a statute that imposes on would-be candidates the price of resignation from their current jobs. The step-at-a-time doctrine is a lax form of scrutiny; a court using

it dismisses an argument that the law is irrational with the response: "Sure, the law is not very sensible in its current form, but the legislature is entitled to address one problem at a time and doubtless will get round to fixing things up later."

The most recent decision of the Supreme Court suggests that courts should avoid putting decisions in terms of a "standard of scrutiny." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), instructs lower courts to "consider the character and magnitude of the asserted injury to the rights protected" by the constitution, to "identify and evaluate the precise interests put forth by the State", and then to decide whether the interests justify the restriction. The decision is functional, not turning on the form of words, and we have therefore held it important to follow what the Supreme Court does rather than attempt to articulate any formal methodology. See *Hall v. Simcox*, 766 F.2d 1171, 1174 (7th Cir.), *cert. denied*, 106 S. Ct. 528 (1985). See also *Dart v. Brown*, 717 F.2d 1491, 1498-1504 (5th Cir. 1983), *cert. denied*, 105 S. Ct. 105 (1984). Here, as in *Hall*, we start by identifying the important patterns in what the Court does.

1. The Court does not demand that the state prove at trial an empirical basis for its judgment that the regulation in question is useful. It will accept a logical justification. When scrutiny is elevated, as in *Craig v. Boren*, 429 U.S. 190, 199-204 (1976), or strict, as in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Court often demands that the state substantiate on the record the basis of its decision. When the basis is open to fair debate—will the publication of the Pentagon Papers lead to the death of soldiers?, will the addition of names to the ballot lead to confusion and the election of inferior public officials?—the demand for proof concludes the case in favor of the person relying on the constitutional right.

Yet all of the cases about the regulation of elections from *Williams v. Rhodes*, 393 U.S. 23 (1968), through *Anderson* ask only whether the state's justification is logi-

cally sound and consonant with common experience. The Court accepts justifications such as "maintaining the integrity of the various routes to the ballot" (*Storer*, 415 U.S. at 733) or "regulating the number of candidates on the ballot to avoid undue voter confusion" (*American Party*, 415 U.S. at 782 n.14) as "compelling" (*ibid.*) without proof that a given number of candidates is "too confusing" or that a particular statute does (or does not) have an identified effect on the number of candidates. See *Hall v. Simcox*, *supra*.

The sorts of interests states assert to justify regulation of elections often cannot be reduced to proof. What would be the standard by which to tell how much confusion is too much? How would we know whether a given change in the rules would help the voters select better candidates?—if we could even begin to know what a better candidate is? A requirement of proof, like a requirement that the state's interests quantitatively outweigh associational interests (how much does an interest weigh?), would either condemn almost all regulation or give courts far too much discretion to substitute their opinions for those of the political branches. The Court has allowed states to justify regulation of elections with logical rather than empirical support in order to preserve the fundamentally political character of these choices.

The acceptability of logical rather than empirical justification does not imply that anything goes. The "justifications" offered for economic regulation often must be taken with a wink or not at all. A law may be designed to protect a politically powerful group, yet the Court will swallow a feeble explanation that it somehow serves more noble purposes. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947); *cf. Vance v. Bradley*, 440 U.S. 93, 110-12 (1979). Compare Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1713-17, 1727-30 (1984), with Frank Michelman, *Politics and Values or What's Really Wrong with Rationality Review*, 13 Creighton L. Rev. 487 (1979). Political

choices respond to influence, not solely to deductive logic. A court that demands consistent, principled lawmaking demands the impossible of a multi-member political body. An effort to deny to pressure groups the fruits of their influence may lead them to secure legislation that appears more neutral but that leaves others worse off still. Cursory scrutiny leaves the daily conflict of political forces to the political arena in which it belongs. But when the result of this process trenches on specific constitutional rights, such as the rights of speech and political association, the Court takes a closer look. The Court does not accept imagined justifications in voting cases. So, here, we do not wink. We require of Illinois a logical justification for §10-4, the real justification and not a front for more sinister objectives, even though we do not insist on evidence establishing how the statute achieves its objectives. (We discuss the justification for §10-4 in Parts II and IV. We are concerned here only with the kind of justification that will be necessary.)

2. Several cases say that the state should select the "least restrictive alternative" when regulating elections. Now "least restrictive alternative" could be a formula for consistent invalidation, because "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring). It is always possible to do less and achieve less. If the Court were unconcerned about requiring the state to achieve less, it would strike down statute after statute. Yet it has not done this. The Court has not used a "least restrictive means" test to undercut the more tolerant approach we have outlined above. See *Hall*, 766 F.2d at 1174.

The point of looking at alternative methods of regulation is that the state must justify each incremental restriction in light of its incremental benefits. See *Anderson*, 460 U.S. at 789. The court must ask what function the rules

serve and how this would be affected by an alternative. If 95% of the benefit of a rule is achieved by the first 5% of restriction, this implies that the remaining 95% of the restriction—the real bite of the rule—achieves almost nothing. It is a familiar problem in regulation. A reduction in the amount of benzene in the atmosphere from 10 parts per million (ppm) to 1 ppm may save 1,000 lives per year at the cost of $1 billion per year. Cf. *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980). Yet it may turn out that a reduction from 10 ppm to 5 ppm would save 950 lives at a cost of $100 million. The marginal gain from the "strict" 1 ppm rule is 50 lives at a cost of $900 million, which puts the justification for the strictness in a different light. In economic affairs a court does not require scrutiny of this sort in the absence of statutory command; when the "strictness" of a regulation comes at substantial cost in constitutionally protected entitlements, however, a comparison of marginal gains against marginal losses is necessary. See *Stevenson v. State Board of Elections*, No. 86-1818 (7th Cir. June 24, 1986), slip op. 8-9 (concurring opinion).

3. A court may study the workings of a statute either in the large (how it influences the conduct of people in general) or in the small (how it applies to the plaintiff). One common line of argument in cases under the first amendment is that the state must justify not only the usual application of the rule but also nature of the effects on (and the possibility of an exception for) the plaintiff. Ballot-access cases like this one are first amendment cases (see *Anderson*, 460 U.S. at 786-88 & n.7) so that in order to decide whether to examine the systemic effects of the statute or the effects on Moore in particular, we must consider the evolution of first amendment doctrine.

For many years the Supreme Court generally examined laws that affect speech and association (as ballot access laws do) in the small. The Court was suspicious of rules, and if the rule overshot or undershot in any respect—as all rules do—the Court was apt to find a defect. No more. The question today is whether the *rule* is adequately jus-

tified, not whether the plaintiff's case is a paradigm for application of the rule or whether the law would fail if the plaintiff were treated differently. E.g., *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3272 n.12 (1984); *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 3070-71 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981). Cf. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 135 (1981) (Brennan, J., concurring); *Goldman v. Weinberger*, 106 S. Ct. 1310, 1316 & n.6 (1986) (Stevens, J., concurring). In *Anderson* the Court analyzed the arguments for and against the rule (a requirement that independent candidates file for office long before parties had selected their candidates) by asking whether they made sense over the run of cases. The dissent asked whether the rule made sense when applied to Anderson himself. See 460 U.S. at 808-12, 822-23 (Rehnquist, J., dissenting). Justice Rehnquist took the majority to task for looking past Anderson's case to the general operation of the statute. We must follow the majority's path and inquire how §10-4 usually operates, not how it affected Moore.

4. One variant of the argument that §10-4 is both overbroad (as applied to Moore) and underinclusive (because it does not pursue to the hilt the interests the state asserts on its behalf) is a contention that the statute is not part of a comprehensive plan. Indeed it is not. It is an occasional piece of legislation. Moore invites us to judge it harshly as a result. But *Clements*, which applied the step-at-a-time doctrine to legislation affecting elections, is sufficient reply. The constitution does not require a state to adopt comprehensive plans or none at all. It is enough if the law the state adopts serves permissible purposes. See also *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984) (rejecting an argument that a city may regulate political handbills only as part of a comprehensive plan).

II

So we come at last to §10-4, and we begin as *Anderson* directs with an assessment of the burden the law imposes on protected interests. The district court found the burden slight, and we concur. The statute applies only to circulators who switch parties during an election season. With the exception of its effect on the candidate himself—to which we return in Part IV—it does not diminish the pool of people available to circulate petitions, a pool the district court found to be ample. It does not increase the number of signatures anyone needs to get on the ballot or the number of circulator-hours necessary to appear once, twice, or more. The statute requires candidates such as Moore who switch parties during an election season to tap a larger *number* of circulators (one set of circulators per party), but it does not demand a greater total effort from circulators. The statute never bars a candidate from the ballot. Anyone may make one run for a single post; Moore himself secured a position on the ballot for a primary election without any hindrance from §10-4. And although §10-4 makes it harder to set up a new party after the primary season, because some circulators are locked-in to the old party, it does not impede the formation of a new party during or before the primaries.[1] The statute does not affect the ability of "used" circulators to speak. They may campaign for anyone to their hearts' content; Moore's friends could have done everything for him in his second race except collect signatures. Section 10-4 does undercut the *value* of the circulators' speech to Moore and

[1] The occasional post-*Anderson* case that announces some form of intensive scrutiny does so only after first concluding that the state has hampered rights of association much more substantially than §10-4 does. E.g., *Republican Party of Connecticut v. Tashjian*, 770 F.2d 265, 283 (2d Cir. 1985), *prob. jur. noted*, 106 S. Ct. 783 (1986). Although we read *Anderson* as dispensing with formal descriptions of levels of scrutiny and therefore would not pursue the same linguistic route as *Tashjian* and similar cases, we need not consider whether we would come out in the same place.

his friends, and what undercuts the value of speech implicates the first amendment. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). But this was true, as well, in cases such as *Heffron* and *Community for Creative Non-Violence*, in which the Court allowed regulation by neutral rules.

Now consider why the state might think §10-4 useful. In evaluating the justifications we proceed, for the reasons developed in Part I, by testing the logical justification for the statute as applied to candidacies in general, not by inquiring whether the state proved empirically a need to regulate the Moore Party's particular acts.

The statute is logically related to a number of permissible purposes, some of which the Supreme Court has called "compelling." The rule promotes the cohesion of political parties. Circulators are the cadre of any political movement. A party needs a cadre to exist. Once a circulator acts on a party's behalf to solicit signatures, he remains the party's agent (if he is active at all) for the electoral season. This helps political parties to act as entities selecting and offering candidates to the voters, interests the Court has found of the highest order. See *American Party* and *Storer*. It induces candidates to cast their lot with (or against) a party for one political season at a time, also interests the Court has held important. *American Party*, 415 U.S. at 781 (the state "may insist that intraparty competition be settled before the general election"); *Storer*, 415 U.S. at 733-36; cf. *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (state may require a voter to select a single political party and make the selection binding for one electoral season); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

Circulators engage in personal, often high-pressure, solicitation. There is always some potential for deceit; there is also a potential for confusion if a circulator identified as the agent of one party suddenly solicits signatures for another party or an independent candidate. The Court has recognized a difference between personal solicitation and speech that is more abstract. Compare *Zauderer v. Of-*

fice of Disciplinary Counsel, 105 S. Ct. 2265 (1985), with *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). The constitution permits greater regulation of personal solicitation in light of its greater potential to confuse. This, too, supports §10-4.

The state also asserts that §10-4 helps prevent maneuvers that could affect the quality of the candidates who will be on the ballot. Suppose, for example, the Whig Party decided that the strongest candidate of the Free Silver Party would be Smith, then running against Jones in a primary. The Whigs would be delighted if Green could enter the primary, draw votes away from Smith, and allow Jones to prevail and represent the Free Silver Party in the general election. The Whig Party might be willing to dispatch its cadre to carry Green's petitions, putting him on the primary ballot. But if this meant locking valuable supporters into the Free Silver Party for a year, the Whigs would be much less likely to try this maneuver. The district court found that §10-4 discourages tactics such as this. Perhaps, as Moore insists, such tactics do not happen very often, but dirty tricks are not unknown in American politics, see *Grimes v. Smith*, 585 F. Supp. 1084 (N.D. Ind. 1984), *aff'd*, 776 F.2d 1359 (7th Cir. 1985), and there is a logical relation between §10-4 and the prevention of one kind of dirty trick.

Moore's argument about dirty tricks carries across the board. He maintains that §10-4 is not very effective in achieving any of the asserted ends. The statute does not preserve the integrity of parties, he contends, because it still permits candidates to switch sides after the primaries; only a sore-loser statute—a rule that a candidate who loses in a primary election is disqualified from running for another party or as an independent candidate in the general election—would achieve the state's objective. The statute does not prevent confusion because it does not regulate the sort of information canvassers provide or otherwise examine their sales pitches; it is not necessary to prevent confusion because sometimes the solicitation is focused so cleanly on the candidate personally (as Moore

asserts it was in his case) that the possibility of confusion never arises. So, Moore concludes, the statute as it stands is both too weak and too strong.

This is a form of the "least restrictive alternative" argument, and we concluded in Part I that an election law need not be "least restrictive." It is enough if the statute achieves permissible ends without pointless restrictions on speech and association. Section 10-4 is not pointless or plainly excessive in relation to its ends. Moreover, the form of "least restrictive alternative" argument Moore has advanced is misleading. Every time a state does less than the maximum it achieves less too, and so it opens itself to the sort of argument Moore makes—that the statute achieves too little to be valid. As we have rejected the argument that the state must do less (the traditional "least restrictive means" approach), so we reject the argument that the state does itself in by attempting to make do with less.

It may be easier to see that §10-4 *is* a less restrictive alternative. It is less restrictive than two kinds of rules the Supreme Court upheld in *Storer*: disaffiliation statutes and sore loser statutes. A disaffiliation statute provides that a candidate must resign (disaffiliate) from one party a substantial time before running on the ticket of another or as an independent. The statute in *Storer* required disaffiliation a year in advance, and the Court found this a legitimate way to secure party unity and focus the party's energies on intra-party competition designed to produce the best candidate. Cf. *Rosario* v. *Rockefeller*, *supra* (sustaining a statute requiring a voter to resign from a party 11 months in advance of voting in the primary of another party). The sore loser statute upheld in *Storer* barred the loser in a party's primary election from running in the general election on any ticket or as an independent. The Court invoked the same set of interests; we suppose it also would have sustained a sore loser statute that treated someone who withdrew from a primary in the face of impending defeat (as Moore did) the same way it treats candidates who endure through election day and lose then.

Either a disaffiliation statute or a broad sore loser statute could have kept Moore off the ballot as a candidate of the Moore Party in 1982. Illinois does not have such a law.[2] Illinois has chosen instead to discourage rather than prohibit successive candidacies in one electoral season. This choice prevents Illinois from achieving its objectives as fully as it could; it also means that the state constrains the exercise of speech and associational rights less than it could. A state may choose the less restrictive—and less effective—path without transgressing constitutional limits.

III

Moore's remaining arguments against the statute as a whole need not long detain us. He says that §10-4 is too vague. But the language ("no person shall circulate or certify petitions for candidates of more than one political party . . . to be voted upon at the next primary or general election") is sufficiently precise in operation. The State Board of Elections issues a guide to candidates for each electoral season. The guide for 1982 contained a step-by-step outline for circulating petitions, and part II.b of the guide states that a circulator "[m]ay not circulate for more than one party . . . [and] may not circulate for an independent candidate or candidates in addition to a political party candidate in the same election". Doubtless both statute

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[2] In 1983 Illinois passed a sore loser statute now codified in §10-2. It provides: "A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his or her nomination at the primary election, is ineligible for nomination as a candidate of a new political party for election in that general election." This statute apparently would not have interdicted Moore's candidacy under the Moore Party's banner in 1982 because Moore withdrew from the primary before he could be defeated. At all events, this statute does not assist Moore to obtain a declaratory judgment that §10-4 is unconstitutional. Quite the contrary, by disqualifying candidates who could run under §10-4, the new sore loser statute diminishes the adverse incremental effects of §10-4.

and guide leave marginal questions unanswered (for example, does "same election" mean the very same post or does it include other posts in the same electoral season?), but not even the Code of Federal Regulations, for all its prolixity, answers all questions. Administrative agencies may overcome vagueness through the accumulation of precedents, just as courts do. See *Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973). Illinois is pursuing that permissible path.

Moore argues, and the district court found, that the Chicago Board of Elections once refused to interpret §10-4 in the way it applied that statute to Moore, citing constitutional problems. On another occasion the Cook County Board held that §10-4 does not prohibit a person who circulated for one party in a primary from changing sides in the general election. See *Marcus v. Nimrod*, No. 82 CO EB 3, quoted at 599 F. Supp. 666. The Chicago Board has changed its tune, and the brief filed in this court on behalf of both the State Board of Elections, which has general supervisory authority over local boards, and the Attorney General of Illinois, assures us that the uniform current practice is to interpret §10-4 as prohibiting a switch within an electoral season. The district court found that this interpretation is correct. The constitution does not require unvarying application of any statute, especially so when the statute is applied by a multitude of local bodies under the guidance of a statewide agency. If Moore had made a showing of detrimental reliance on the cases he cites, we might have a difficult problem. But he did not; he was blissfully ignorant of §10-4. The problems lurking within §10-4 did not injure Moore, and in light of his experience in 1982 cannot injure him in the future. He knows, however painful the acquisition of knowledge may have been, that the State Board construes the statute broadly.

Moore's contention that §10-4 favors the major parties fares no better. He apparently believes that a circulator may carry petitions for the two major parties in the same season but may not do so for a major party and a minor

party. The language of §10-4 does not support this belief, and the candidates' guide prepared by the State Board of Elections likewise treats all parties alike. A provision in §10-2 states that "political party," as used elsewhere in the election code, "shall mean any political group which shall hereafter undertake to form an established political party in the manner provided" by law—in other words, all political parties are treated alike under §10-4.

IV

Although we have rejected Moore's challenges to the structure of §10-4 and its application to new or small parties, we must also consider whether the statute is constitutional as applied to candidates who circulate their own petitions. Moore contends that candidate-circulators are a special case because the first amendment rights of the speaker-circulator are greatest when the circulator is the candidate. The candidate may wish to convey the message "I'm a grass roots candidate" or "I'm willing to do my own work", messages that are harder to send if §10-4 forbids candidates from doing their own work. A candidate's personal approach to the voters for support may be inseparable from the message of his campaign and essential to its success.

On the other side of the balance, the state's interest in regulating the candidate's circulations is significantly less. The candidate is identified with himself and his message, not with a party. As a result, candidates as circulators do not threaten confusion and are less likely to play dirty tricks. To pull a political stunt a party usually needs a cadre, not a single candidate. We think it an open question whether the justifications the state has offered for §10-4 are even *applicable* to candidate-circulators, let alone sufficient to support an abridgment of the constitutional interests at stake. The question is difficult. Although the burden on candidates may be great, some of the greatest impediments—disaffiliation statutes, sore loser statutes, resign-to-run statutes—apply exclusively to candidates.

Cases such as *Buckley v. Valeo, supra*, treat candidates and their organizations as one entity for most purposes; to restrain the organization is to restrain the candidate, and the reverse.

We do not say how a focused challenge to the application of §10-4 to candidates as circulators should be resolved. Our difficulty is that the findings of the district court concern the application of §10-4 to supporter-circulators exclusively. The district judge did not separately assess the state's justifications for restraining the speech-related conduct of the candidate. The parties' briefs have devoted only slightly more attention to the differences between candidates and other circulators. Moore has done enough to preserve the constitutional issue for decision, but not enough to make it appropriate for us to decide the question without the benefit of the district court's views.

On remand the district judge may determine that candidates and non-candidate circulators have materially identical first amendment interests and that, despite the different roles they play in the electoral process, both are subject to the state's proffered justifications. Or he may hold that Moore the candidate failed to carry his burden in this regard. On the other hand, he could decide that the justifications offered for §10-4, as applied to candidate-circulators, are inadequate or nonsensical. The record might support any of these conclusions. The district court should make them first, and there will be an occasion for appellate review later.

To the extent the district court held §10-4 constitutional as a general rule, the judgment is affirmed. To the extent the district court held §10-4 constitutional as applied to candidates circulating petitions for their own candidacies, the judgment is vacated, and the case is remanded for further proceedings consistent with this opinion. Appellants will recover half of their costs.

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APPENDIX E

No. 62953

In The

Illinois Supreme Court

Citizens for John W. Moore Party, *et al.*, *Plaintiffs-Appellants* v. **Board of Election Comm'rs of the City of Chicago,** *et al.*, *Defendants-Appellees*	Rule 20

ORDER

This Court respectfully declines to answer the question of law certified to this Court by the United States Court of Appeals for the Seventh Circuit in its case No. 85-1012.

FILED

JAN 23 1986

SUPREME COURT CLERK

APPENDIX F

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1012

CITIZENS FOR JOHN W. MOORE PARTY, et al.,

Plaintiffs-Appellants,

v.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 5901—William T. Hart, *Judge.*

ARGUED SEPTEMBER 12, 1985—DECIDED JANUARY 13, 1986

Before COFFEY, EASTERBROOK, and RIPPLE, *Circuit Judges.*

PER CURIAM. This order constitutes a certification of a question of law to the Supreme Court of Illinois.

Plaintiff John W. Moore was a democratic candidate in the March, 1982, primary election for the office of state senator for the 16th Legislative District. Although Moore and his supporters circulated petitions for his candidacy, he withdrew his name for the state senate nomination one month before the primary. After withdrawing his nomination for the office of state senator, Moore and his supporters decided to form a new political party (Citizens for

John W. Moore Party) and to circulate petitions to place Moore on the ballot for the general election in November, 1982, as a candidate for the Illinois House of Representatives in the 31st House District. To qualify for a place on the ballot, Moore was required to collect 1,500 valid signatures; Moore collected 3,829 signatures.

The Board of Election Commissioners invalidated 1,493 signatures for reasons unrelated to this appeal. 975 signatures were invalidated because Moore had previously circulated nominating petition sheets in the democratic primary. After the signatures were invalidated, Moore was 139 signatures short of qualifying for a place on the ballot.

In invalidating the 975 signatures collected by Moore, the Board relied on Ill. Rev. Stat. ch. 46, §10-4 (1981), which provides in relevant part: "No person shall circulate or certify petitions for candidates for more than one political party, or for an independent candidate or candidates in addition to one political party, to be voted upon at the next primary or general election." The Board set aside the signatures Moore had collected because the Moore Party was the second party for which Moore had solicited signatures in the 1982 election season (the democratic party was the first party).

Moore filed suit in the Federal District Court arguing that §10-4 violated the First and Fourteenth Amendments and the Equal Protection Clause of the United States Constitution and was unconstitutionally vague. The district court rejected all of his arguments. As part of the analysis of the First and Fourteenth Amendment claims, the district court found that §10-4 forwarded three state interests: (1) the state interest in insisting that intra-party competition be settled before the general election to avoid factionalism and party splintering; (2) the state interest in avoiding election abuse; and (3) the state interest in preventing voter confusion. As to the voter confusion interest, the district court wrote:

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> "The circulator provision is designed to provide stability. Voter confusion can easily occur (here in the same area) as circulators are allowed to switch sides in the same campaign. Abuse or at least confusion can occur if professional circulators serve competing interests espousing divergent views. Just as voters may be limited to nominating one candidate or supporting one party in a primary election, and candidates may be limited to running under the banner of one party, so too are circulators, whose importance to a political party or campaign is significant, limited to campaigning on behalf of one political party or independent candidate in the same election. The circulator restriction provision is a permissible integral part of an overall legislative scheme to regulate elections."

Moore renewed his equal protection, First and Fourteenth Amendment, and vagueness arguments in the United States Court of Appeals. As to the state's interest in preventing voter confusion, the question was raised whether "no person" in §10-4 applies to signatures gathered by candidates. If the statute does not apply to candidates, the Board acted improperly in invalidating the 975 signatures collected by Moore. If, on the other hand, the statute applies to candidates, questions are raised as to whether the statute serves an important government interest when applied to candidates and whether the statute directly interferes with the candidate's ability to communicate with the voters. Our research has failed to reveal controlling precedent by the Supreme Court of Illinois on the question of whether "no person" in Ill. Rev. Stat. ch. 46, §10-4 (1981) applies to signatures gathered by candidates. Accordingly, pursuant to Rule 20 of the Illinois Supreme Court Rules (adopted August 30, 1983) this court respectfully requests the Supreme Court of Illinois to provide this court with instructions concerning the following question of law which may be determinative in this case:

> Does Ill. Rev. Stat. ch. 46, §10-4 (1981) apply to signatures gathered by candidates for office?

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The Clerk of this court will transmit to the Supreme Court of Illinois a certified copy of this order; a copy of the briefs and appendix submitted to this court; and, if necessary, the record in this matter.

QUESTION CERTIFIED

EASTERBROOK, *Circuit Judge*, dissenting. John Moore ran afoul of a statute providing that "no person shall circulate or certify petitions for candidates of more than one political party . . . to be voted upon at the next primary or general election." Ill. Rev. Stat. ch. 46 §10-4. The court has asked the Supreme Court of Illinois to tell us whether §10-4 applies to signatures gathered *by* (as well as for) a candidate for office. That court is entitled to express puzzlement at our request. The statute says "no person," and by all accounts Moore is a person.

The order of certification may enable our court to avoid a constitutional question. Courts properly turn somersaults to avoid difficult constitutional issues. Yet there are limits to creative avoidance. For example, a court may not frustrate legitimate applications of a statute in the name of avoiding constitutional issues. *United States v. Riverside Bayview Homes, Inc.*, 54 U.S.L.W. 4027, 4029 (U.S. Dec. 4, 1985); Henry J. Friendly, *Benchmarks* 207-12 (1967). This case illustrates these limits.

The Board of Election Commissioners of Chicago applied the statute to Moore and disqualified the signatures he gathered in his second try for office, under a second party banner, during the 1982 election season. So far as I can tell, Moore did not argue before the Board that he is not a "person" within the meaning of §10-4. The Board's application of §10-4 to Moore is consistent with the construction placed on the statute by the State Board of Elections. A Candidates' Guide, which contains the State Board's advice about the meaning of the statute, draws no distinction between candidates and other circulators.

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We have a statute that is clear, applied consistently by the state officials charged with applying it. That makes a sufficient case for treating the statute as meaning what it says. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589 (1980); *Swain v. Pressley*, 430 U.S. 372, 378-79 (1977). Legislative history might cut the other way, but there is no published legislative history in Illinois, and the testimony the district judge received concerning the legislative history did not hint that Illinois drew a distinction between candidates and other people that has so far eluded the state officials charged with enforcing the statute. The decisions of intermediate courts in Illinois also might undermine the clarity of the statute, but none has construed §10-4.

Moore apparently agrees with the state's construction of this statute. His complaint argues that §10-4 applies to all persons and is therefore unconstitutional. He did not ask the district court to draw a distinction between candidates and other persons. He did not argue that the state officials have misconstrued the statute. The district court held a full trial, and this issue did not arise; the court's opinion treats this as a constitutional attack on a statute with an agreed meaning. Moore has been consistent. His briefs in this court do not mention the possibility of distinguishing between candidates and other persons. He has not suggested certification; the state has not suggested abstension.

This is not to say that Moore thinks the statute clear; to the contrary he argues that it is unconstitutionally vague. But his arguments are based on different problems. Moore insists that the statute may not apply to dual circulations for major parties, or to circulations for a party and then an independent candidacy. He says that the statute does not necessarily apply to circulation for one party in a primary election and another for the general election. Although Moore is represented by highly skilled counsel who looked at this statute through a microscope, counsel did not find the particular "ambiguity" the majority sees.

Counsel presumed the application of §10-4 to candidates and used that application as the fulcrum of her attack: for example, "Section 10-4 prohibited Moore from communicating with his constituents by circulating his petitions" (Reply Br. 14). The question whether §10-4 applies to candidates entered this litigation for the first time in questions posed by the court to counsel at oral argument.

So the Supreme Court of Illinois may wonder why we have asked for its views on the construction of an unambiguous statute that has been consistently applied by the state officials charged with its implementation. I wonder why the court has picked *this* case to certify. We are bombarded with requests to certify to state courts difficult issues of state law. We regularly decline those requests, despite conflicts among intermediate state courts, unless we are persuaded that the question is unusually close and difficult. E.g., *Katapodis v. Koppers Co.*, 770 F.2d 655, 660 (7th Cir. 1985). What about this case calls for certification when other, genuinely difficult, cases are not certified? The majority does not say.

The problem concerns more than prudence in the management of our docket and maintaining good relations with state courts. The difficulties go to our *power* to act as the majority has. We lack jurisdiction to decide this case on a question of state law, and therefore we have no business asking the state court for an advisory opinion. We lack authority to decide this case on a basis that was not presented to the district court. If we have authority we lack reasons. Finally, all these difficulties to one side, we certify the wrong question.

The problem of jurisdiction. This is a suit against the State of Illinois. The complaint names the State Board of Elections and its members; Moore ran for state office and needs a judgment that will bind the entire state. The City Board's status is less clear, but it is constituted under state rather than municipal law and enforces state statutes. It is "not a unit of local government" (Ill. Rev. Stat. ch. 46 §6-21). Whether an entity is "the state" for

purposes of the Eleventh Amendment depends on "the nature of the entity created by state law." *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). *Mt. Healthy* concluded that a school district raising revenue and making choices locally was not part of the state, and other cases hold that counties and other units of local government are not the state. But the City Board is part of a statewide, hierarchial organization of which the State Board is the apex. Local boards administer state law under guidance from the State Board. It is appropriate to treat the City Board as an instrument of the state.

Moore therefore must avoid the Eleventh Amendment, which presumptively bars all litigation in federal courts against the state. *Green v. Mansour*, 54 U.S.L.W. 4011 (U.S. Dec. 3, 1985); *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142 (1985); *Alabama v. Pugh*, 438 U.S. 781 (1978). The usual way around this is to name some agents, as Moore has done, and to argue that their acts implementing an unconstitutional statute exceed their authority. See *Ex parte Young*, 209 U.S. 123 (1908).

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), holds that *Young* does not authorize a suit based on a state official's violation of state law. A federal court may order prospective relief based on a violation of the constitution or of federal law, but it may not order state officials to comply with state law. Anyone who wants a judicial order compelling state officials to abide by state law must seek that relief in state court.

Moore wants an injunction against the operation of §10-4. An order carving candidates out of the scope of §10-4 would give him partial relief. Under *Pennhurst* we cannot direct state officials to provide that partial relief on the basis of state law. A construction of a statute by the supreme court of the state would provide a solid foundation for relief, but the Third Circuit in *Pennhurst* relied on a construction of the law by the state court, and the Supreme Court found that this did not grant it authority

to act. The fact that the construction of state law has been supplied in the very case under review would not enlarge the federal court's power.

The certification to the Supreme Court of Illinois therefore asks for a construction of state law that would have no use. It could be, at most, the basis of an injunction based on state law, and we lack the authority to issue such an injunction. The state court's answer, if adverse to Moore, would return the case to its current posture and require us to face the merits. An answer favorable to Moore certainly would not be a basis for deciding this suit *against* him. Perhaps state officials, bound by a construction of §10-4 favorable to Moore (should one be forthcoming), would give him the assurances he seeks that he will not again have signatures rejected on the basis of that statute. But there had been an authoritative construction in *Pennhurst*, and the state's executive officials did not meekly submit.

Sometimes an answer to a question of state law would dissolve the basis of the federal claim and enable the court to dismiss the case. This was so in the two cases involving constitutional questions that the Supreme Court has certified to state courts. See *Elkins v. Moreno*, 435 U.S. 647, 660-62 (1978); *Bellotti v. Baird*, 428 U.S. 132, 146-51 (1976). We cannot be confident, however, that a decision by the Supreme Court of Illinois favorable to Moore would make this case moot. Moore still would want an injunction against the application of §10-4 to other circulators (he said at oral argument that the statute applied to almost all of his circulators and would have knocked out almost all his signatures had the Board seen fit to rule on signatures other than the ones he gathered). His principal argument is that tiny parties have tiny cadres of loyal circulators, and §10-4 injures small parties even if candidates may gather signatures for themselves. He would want relief against the application of §10-4 to candidates as part of this judgment. The Supreme Court of Illinois cannot give him that. A certification requests that court's advice to this court; the *judgment* will be ours. So this case is not

going to die a natural death. Moore needs an injunction, and *Pennhurst* prevents him from getting one in federal court on the basis of a construction of state law that disagrees with the construction placed on it by the State Board.

To make matters worse for Moore, even if the City Board is an agent of local government, so that the Eleventh Amendment does not apply, *Pennhurst* holds that principles of comity prevent the issuance of an injunction based on state law that runs against actors outside the Eleventh Amendment, when the principal actors are shielded. 465 U.S. at 123-24. The principal actors here are the State Board and its agents, which (through the Attorney General of Illinois) have assumed the defense of this litigation. My earlier assumption that the City Board is part of the "state" therefore turns out not to be dispositive, and *Pennhurst* bars the way more completely than the Eleventh Amendment does of its own accord.

This is an unhappy result. Courts ordinarily struggle to find ways to avoid resolving constitutional questions; the interpretation of the Eleventh Amendment adopted in *Pennhurst* may force a federal court to reach the constitutional issue even though plausible state-law grounds are available for decision. The case has been criticized with great vigor, both by the four dissenting Justices and by careful scholars. E.g., David P. Currie, *Sovereign Immunity and Suits against Government Officers*, 1984 Sup. Ct. Rev. 149, 164-67; David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 Harv. L. Rev. 61 (1984). The majority in *Pennhurst* may not have thought about the interaction between its holding and certification of questions of state law that has troubled me here, and perhaps my analysis is an extension rather than a simple application of *Pennhurst*. I must accept the law of sovereign immunity as it is, however, and if the logic of a decision compels its extension to a situation not expressly contemplated, a lower court must follow. There is no principled escape from the analysis that produces the dismal conclusion that our court cannot do

anything constructive with the advice we have requested from the Supreme Court of Illinois.

The problem of authority. Put this all aside, and we still should not certify the case. An appellate court is limited to the issues properly preserved. Moore did not argue before the Board, in the district court, or here, that a candidate for office is not a "person" under §10-4. This is not an issue naturally subsumed in a constitutional challenge; it is a pendent state claim, a different ground of entitlement to relief.

In a criminal case an appellate court might find a construction of a statute "plain error" and grant relief under Fed. R. Crim. P. 52(b), but there is no "plain error" rule in the rules of civil procedure. In civil cases courts must decide cases as parties present them, and if they neglect to preserve winning issues that is too bad for them. We have abjured—even denounced—the practice of reversing decisions on grounds not preserved by the appellant. E.g., *General Motors Acceptance Corp. v. Central National Bank of Mattoon*, 773 F.2d 771, 778 n.5 (7th Cir. 1985); *Spanish Action Committee v. City of Chicago*, 766 F.2d 315, 319 (7th Cir. 1985); *City of Chicago v. Department of Labor*, 753 F.2d 606, 607 n.1 (7th Cir. 1985); *Walker v. Maccabees Mutual Life Insurance Co.*, 753 F.2d 599, 602 (7th Cir. 1985); *Parratt v. City of Connersville*, 737 F.2d 690, 698 (7th Cir. 1984), *cert. dismissed*, 105 S. Ct. 828 (1985). We have also refused to consider grounds raised belatedly, for example in a reply brief, see *Christmas v. Sanders*, 759 F.2d 1284, 1291-92 (7th Cir. 1985); *Beerly v. Department of the Treasury*, 768 F.2d 942, 949 (7th Cir. 1985), or raised perfunctorily, see *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984).

These doctrines augment the litigants' incentive to develop the record and make their points in a timely fashion. If §10-4 does not apply to candidates the district court has held a pointless trial and wasted much time; so have we. Only a consistent application of the rule barring consideration of new arguments on appeal will preserve the

incentive to marshall one's resources for a single, thorough litigation. Cf. *Wainwright v. Sykes*, 433 U.S. 72, 88-90 (1977); *Thomas v. Arn*, 54 U.S.L.W. 4032, 4034 (U.S. Dec. 4, 1985).

Even in a criminal case the first requirement of "plain error" is "error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163 (1982). The application of the language "no person" to include Moore—an application required by the consistent construction of the statute by responsible state officials—hardly is "plain error" in the criminal law sense. The only time it has undertaken review of a civil judgment for "plain error", the Supreme Court said that the approach is "suited to correcting obvious instances of injustice or misapplied law." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981). Again there is nothing "obviously" wrong with the state agencies' construction of §10-4.

Newport also illustrates the limitations of review of plain error in civil cases. The district court and the court of appeals had considered the merits fully, and the claim of error had been briefed and argued in the Supreme Court. The Court remarked that because the question had been developed thoroughly at all three levels, and the error could be corrected without a new trial or further proceedings, it was appropriate to proceed. 453 U.S. at 256-57 & n.12. It cautioned that its decision to review the merits did not portend approval of similar decisions by appellate courts, *id.* at 257 n.16, see also *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427, 2432 & n.3 (1985), and three Justices found even this limited inroad of plain error review into the civil process unacceptable, *id.* at 271-79 (Brennan, Marshall & Stevens, JJ., dissenting).

The question the majority raises in this case has not been briefed or argued in any court. The parties may have had good reasons for leaving the question alone. For all we know, they could cite to us in an instant a dispositive

piece of legislative history showing that "no person" includes candidates. No case the Supreme Court has decided, no case this court has decided, permits a court to inject a new issue into a civil case at this late date. The majority does not justify this novel procedure.

The problem of reasons. If there is an error in the construction of §10-4, the mistake is not "plain." Indeed the majority invites the Supreme Court of Illinois to twist some decently plain language in the statute. Why? A court should avoid constitutional decisions when possible, and a construction of §10-4 to exclude candidates would enable us to avoid passing on the constitutionality of that portion of §10-4. The principle of avoidance does not counsel the avoidance of all constitutional issues, however, and it does not require a federal court to send cases routinely to state courts for advice.

This question arises frequently when a statute is unclear, and courts then consider abstaining in favor of litigation in state courts. (Abstension avoids the problem of the Eleventh Amendment, because the state court enters the judgment on the state law ground.) But abstension is an uncommon response to constitutional challenges to statutes. For example, in *Mazanec v. North Judson - San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985), the court dealt with a statute requiring children in private schools to be given an education "equivalent to that given in the public schools." 763 F.2d at 846. Some Jehovah's Witnesses, who wanted to educate their children at home, attacked the statute as an infringement of their religious rights. The interpretation of "equivalent" was a central issue in the suit. Several years into the litigation the district court abstained, and we held this an abuse of discretion. We observed that the statute was clear enough to decide the constitutional question without further time-consuming proceedings in state court. A case that is well under way, we said, should be completed. Certification is less costly and time-consuming than abstension, but "no person" is easier to understand than "equivalent." What makes this a good case for certification when the absten-

sion in *Mazanec* was an abuse of discretion? The majority does not say.

Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985), is the Supreme Court's latest decision on point. The plaintiff challenged a statute banning certain books and films that "appeal to the prurient interest." The case turned on the meaning of "prurient" and "lust," two terms that the parties vigorously debated from the beginning. The court of appeals declined to abstain and held the statute unconstitutional. The Supreme Court found "prurient" and "lust" clear enough to be dealt with by a federal court, and it held the statute constitutional if these words are defined to exclude "normal sexual appetites." Now "prurient" and "lust" make "no person" look like a beacon of clarity, and three Justices in *Brockett* argued that the Court should have abstained or certified the construction of the law to the Supreme Court of Washington. 105 S. Ct. at 2804-05 (O'Connor, J., joined by the Chief Justice and Rehnquist, J.). The Court thought otherwise. What makes this a good case for certification when *Brockett* was not? The majority does not say.

Certification might avoid a constitutional issue, but this was true in *Brockett* and *Mazanec* as well. Ours is not an especially difficult constitutional issue anyway. The Supreme Court has repeatedly upheld restrictions on candidates' activities more onerous than those contained in §10-4. See *Storer v. Brown*, 415 U.S. 724 (1974) (state may enact disaffiliation and sore loser statutes that lock a candidate into a political party for a year and forbid running in general election after losing in a primary); *Clements v. Fashing*, 457 U.S. 957 (1982) (state may enact rule requiring a public official to resign from office in order to be a candidate for a different office). Cf. *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (state may require a voter to select a single political party and make the election binding for one electoral season); *American Party of Texas v. White*, 415 U.S. 767, 781 (1974) (a state "may insist that intraparty competition be settled before the general election"). The Court reached these conclusions

using a "strict scrutiny" approach, from which it has since retreated. See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Hall v. Simcox*, 766 F.2d 1171, 1174 (7th Cir.), *cert. denied*, 54 U.S.L.W. 3375 (U.S. Dec. 2, 1985); *Dart v. Brown*, 717 F.2d 1491, 1498-1504 (5th Cir. 1983), *cert. denied*, 105 S. Ct. 105 (1984).

Section 10-4 is a good deal less restrictive than a disaffiliation statute or a resign-to-run statute. These statutes impose large costs on running or make any change of party lines impossible. Section 10-4, by contrast, imposes a modest cost on changing parties during an election season. A person who remains in the same party may use one group of solicitors to obtain signatures for as many offices as he seeks. A person who changes parties will need another group of people to circulate petitions. The relative disadvantage that §10-4 imposes on dual-party candidates does not affect the total number of signatures the candidate must obtain. Moore needed 600 signatures to get on the primary ballot for the senate, and he needed 1,500 to get on the general election ballot for the house whether or not he switched parties. Section 10-4 does not affect the number of signatures needed and therefore does not affect the number of circulator-hours needed to obtain the signatures. It affects only the identity of those who circulate petitions. A candidate who switches parties during an election campaign must demonstrate a somewhat broader base of support by being able to attract a new group of circulators.

The state's justifications for §10-4 may not apply as forcefully to candidates as to other circulators, but the Court has never required a perfect fit between justification and application. This case is easier on the merits than either *Mazanec* or *Brockett*. Yet those courts reached the merits, while the majority certifies a question to the Supreme Court of Illinois.

The questions to be certified. If we are to seek the views of the Supreme Court of Illinois, we should ask it to clarify the statute on the points of *genuine* obscurity.

Moore's first argument on appeal is that §10-4 is unconstitutionally vague—but not because of an ambiguity in "no person". Moore says that the application of the statute to dual circulations for two major parties is unclear, and that if it does not apply to such circulations it discriminates in favor of major parties. He also maintains that the statute's application to circulations for a party and then an independent candidacy is uncertain.

An additional ambiguity lurks here: what is the "next primary or general election" of which the statute speaks? If the statute applies only to consecutive races for the same office (i.e., the state house of representatives in primary followed by general election), it does not affect Moore, who first ran in the primary for state senate and then tried to enter the general election for the state house of representatives. Perhaps, too, the statute applies only to dual circulations for the "next . . . election", be it primary or general. On this view, if Moore circulated petitions first for the house and then for the senate during the primary election season, §10-4 would apply, but the statute would not apply to a circulation for the house in the primary followed by a circulation on a different party line for the same office at the general election—a different "election."

The case for certifying this question is far more powerful than the case for certifying the definition of a "person." Although the state has applied the statute consistently to candidates, it has not been consistent about the application to different elections. The Board of Election Commissioners of Cook County once rejected a challenge to signatures gathered on behalf of a candidate in Moore's position with the comment (*Marcus v. Nimrod*, No. 82 CO EB 3):

> [T]here is no statutory or case law prohibition against one circulating a nominating petition for a candidate for the primary election and then circulating a petition to form a new political party and to nominate another candidate for a different office for a different election, to wit, the General Election . . . .

Moore raised this issue on every occasion. There is a genuine ambiguity. Like the question the majority has certified, a question about the temporal domain of the statute could be answered in a way that would enable us to avoid a constitutional issue. Why certify one question but not the other? The majority does not say. Why not certify the issues the parties *have* litigated, concerning which Moore says the statute is ambiguous? The majority does not say.

This certification may come out right in the end. If the statute is as clear as I think it is, the state court's answer is foreordained. There will simply be a waste of the parties' time and money. But if the state court construes "person" not to include candidates, then we have a real problem, because we cannot act on the advice we have received. We ought not to put the Supreme Court of Illinois, or our own court, in such a pickle.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 60054—Midwest Law Printing Co., Inc., Chicago—1-13-86—450

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITIZENS FOR JOHN W. MOORE PARTY, JOHN W. MOORE and WILLIE ANDERSON,
Plaintiffs,

v.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, *et al.*,
Defendants.

No. 82 C 5901

MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is a civil rights action for declaratory and injunctive relief, brought under 42 U.S.C. § 1983 and 28 U.S.C. § 1651, 2201-2202. Plaintiffs challenge the constitutionality of the actions, on August 24, 1982, of the defendant Board of Election Commissioners of the City of Chicago (the "Board") and its members in holding insufficient the nominating petitions of plaintiff John W. Moore Party and plaintiff candidate John W. Moore. Plaintiffs further challenge the constitutionality of § 10-4 of the Illinois Election Code. Ill. Rev. Stat. 1981, ch. 46, § 10-4.[1] Based on that provision, the Board invalidated some of plaintiffs' new political party nominating petitions for the office of Representative in the Illinois General Assembly at the

[1] The relevant portion of § 10-4 states:

> Provided, further, that no person shall circulate or certify petitions for candidates of more than one political party, or for an independent candidate or candidates in addition to one political party, to be voted upon at the next primary or general election.

Representative in the Illinois General Assembly at the November 2, 1982 general election, as they were circulated by a person who previously circulated established political party nominating petitions for the office of Illinois State Senator at the March 16, 1982 primary election.

This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1343(3) and 1343(4) in that plaintiffs seek to redress the deprivation, under color of state law, of rights secured to them by the Constitution of the United States, including the First and Fourteenth Amendments. The fact that the election has passed does not moot the issues presented in the complaint. Declaratory relief may still be granted. *Storer v. Brown*, 415 U.S. 724, 737, n.8 (1973); *Rosario v. Rockefeller*, 410 U.S. 752, 756, n.5 (1973).

Plaintiffs filed this action on September 24, 1982. On October 2, 1982 plaintiffs appeared before the Court in support of their motion for a temporary restraining order and preliminary injunction declaring unconstitutional § 10-4 of the Illinois Election Code and requiring defendants to validate nominating petitions for plaintiff Moore as a candidate for the office of representative in the General Assembly and to cause his name to be printed on the November 2, 1982 ballot. After considering the motion and materials filed by the parties and hearing oral argument, the Court concluded that plaintiffs had failed to seek equitable relief in a timely fashion in the context of an election case and had failed to show a reasonable likelihood of success on the merits. Accordingly, injunctive relief was denied.

William Anderson joined this action individually as a plaintiff and on behalf of all others similarly situated who desired to vote for plaintiff Moore. However, no motion to certify a class was made and this action proceeded to trial as an individual action.

Plaintiffs waived their claims against Stanley Kusper and Taylor Pouncey and their motion to dismiss the action as to them is hereby granted.

FINDINGS OF FACT

On September 4, 1984 the pretrial order was approved. The pretrial order included a stipulation of uncontested facts which the Court adopts as findings of fact as follows:

1. Plaintiff Citizens for John W. Moore Party ("Moore Party") is an unincorporated association with its principal office in Chicago, Illinois.

2. The Moore Party sought to form a new political party in the Thirty-First Representative District and to nominate John W. Moore ("Moore"), its party chairman, as its candidate for Representative in the Illinois General Assembly for the Thirty-First Representative District in the November 2, 1982 General Election.

3. Plaintiff Moore is a United States citizen over twenty-one years of age who resided in the Thirty-First Representative District for over two years by the time of the November 2, 1982 General Election.

4. Plaintiff Moore sought to run as a candidate of the Moore Party for the office of Representative in the General Assembly for the Thirty-First Representative District in the November 2, 1982 General Election.

5. Plaintiff Willie Anderson ("Anderson") is a United States citizen over eighteen years of age who is registered to vote in the Thirty-First Representative District.

6. Plaintiff Anderson desired to vote for Moore, the candidate of the Moore Party, for the office of Representative in the Illinois General Assembly for the Thirty-First Representative District in the November 2, 1982 General Election.

7. Defendants Michael E. Lavelle ("Lavelle"); James R. Nolan ("Nolan") and Corneal A. Davis ("Davis") are members of and comprise the Board of Election Commissioners for the City of Chicago ("Chicago Board"). Defendant Lavelle is chairman of said Chicago Board. Said defendants were responsible under the Illinois Election

Code (Ill. Rev. Stat. 1981, ch. 46, § 1-1 *et seq.*) for determining the validity of nominating petitions of new political parties and of persons seeking to become candidates for election to the office of Representative in the General Assembly for the Thirty-First Representative District for the November 2, 1982 General Election and for printing the names of all candidates running for office in the November 2, 1982 General Election from a territory either partially or wholly within the City of Chicago. In addition, said defendants conducted and declared the results of said election.

8. Defendants J. Phil Gilbert; Michael J. Hamblet; John W. Countryman; Richard A. Cowen; Carolyn R. Eyre; Joshua Johnson; John L. Lanigan and Teresa M. Petrone are members of and comprise the Illinois State Board of Elections. The Illinois State Board of Elections was required by law to certify to the County Clerk, the names of the candidates for election with respect to the general election held in November of 1982. Because the Board of Election Commissioners for the City of Chicago determined that the plaintiff Citizens for John W. Moore Party and its candidate John W. Moore did not have sufficient signatures on its petition to qualify for the 1982 election for State Representative for the Thirty-First Representative District, the Illinois State Board of Elections did not so certify the candidacy of John W. Moore for the office of Representative in the General Assembly.

9. Taylor Pouncey ("Pouncey") is the person who objected to the validity of plaintiffs' nominating petitions and thus initiated the proceedings before the defendant Board and the enforcement of the statute against which plaintiffs herein complain. Pouncey was the nominee of the Democratic Party for election to the office that Moore sought.

10. Plaintiffs Moore Party and Moore timely filed nominating petitions purporting to contain 3,829 valid signatures.

11. Pouncey timely filed objections to said nominating petitions. Among the deficiencies in the nominating petitions alleged by Pouncey was the following:

> John W. Moore circulated Petitions for Nomination for the Democratic Party in December, 1981 for candidates to be elected at the November 2, 1982 general election and circulated sheets of the Petition to form Citizens for John W. Moore in violation of Section 10-4, the Illinois Election Code. More particularly, John W. Moore circulated sheets numbered (numbers specified) in the Petition improperly and the 975 signatures on those Petition Sheets are invalid because of an improper circulator.

12. At the hearing before the defendant Chicago Board, plaintiffs Moore Party and Moore, *inter alia*, moved to strike the objections to the petition sheets circulated by plaintiff Moore on numerous factual and constitutional grounds.

13. At the hearing before the defendant Chicago Board, uncontroverted evidence was introduced that plaintiff Moore had circulated petitions seeking the Democratic Party nomination of himself for the office of State Senator for the Sixteenth Legislative District at the March 16, 1982 Primary Election. Further uncontroverted evidence was introduced that, in or around April of 1982, plaintiff Moore circulated new political party petition sheets seeking to place the Citizens for John W. Moore Party on the November 2, 1982 general election ballot for the office of Representative in the General Assembly for the Thirty-First Representative District. Plaintiff John W. Moore was said party's candidate for Representative.

14. Defendant Chicago Board denied plaintiffs' motions to strike the objections to the petitions circulated by Moore and, on August 24, 1982, issued a written opinion finding that the Moore party's nominating petition was invalid in that it contained an insufficient number of sig-

natures to qualify the plaintiff Moore Party and plaintiff Moore for access to the ballot as a candidate for the office of Representative in the General Assembly for the Thirty-First Representative District for the November 2, 1982 general election.

15. As a result of the defendant Chicago Board's actions, the plaintiff Moore and the plaintiff Moore Party did not appear on the ballot for the November 2, 1982 general election. But for the defendant Chicago Board's ruling invalidating petition sheets circulated by the candidate himself (containing 975 otherwise valid signatures), the nominating petitions would have contained the 1500 signatures required to place the names of the Moore Party and the candidate Moore on the ballot.

16. In the cases of "Big James" Phipps, Case No. 80 EB 3 and James "Skip" Burrell, Case No. 80 EB 4, both decided on December 27, 1979, the Chicago Board, in sustaining the candidate's Motions to Strike Paragraphs 5 and 6 of Objector's Petitions, cited the following reasons for its decision:

> Paragraph [5,6] of the Objector's Petition relies on the prohibition in Section 10-4 of the Election Code against the circulator of an independent candidate's petition from also circulating a petition for a candidate for a political party to be voted upon at the next Primary or General Election. The prohibitions contained in Section 10-4 are susceptible to varying interpretations. Moreover, there is no evidence in the record as to when in point of time the petitions (independent as well as political party) were circulated. Accordingly, to strike the signatures on petition sheets in question would violate the judicial standard of the electoral review enunciated in *Briscoe v. Kusper*, 435 F.2d 1046. (7th Cir. 1971).

17. In *Marcus v. Nimrod*, No. 82 CO EB 3, before the County Electoral Board, that Board held:

> Paragraph Eight of Objector's Petition alleges

> that certain sheets should not be counted in that the circulators of some of the sheets had previously circulated petition sheets for candidates of other political parties. This Electoral Board finds that there is no statutory or case law prohibition against one circulating a nominating petition for a candidate for the primary election and then circulating a petition to form a new political party and to nominate another candidate for a different office for a different election, to wit, the General Election to be held on November 2, 1982, and that such finding is consistent with previous holdings of the City of Chicago Municipal Officers Electoral Board.
>
> Therefore, Paragraph Eight is hereby stricken and overruled.

18. A political party which at the last election in any legislative district polled more than five per cent of the entire vote cast within such district for the election of officers to serve the district is an "established political party" within the meaning of Article 10 as to such district. Section 8-2 defines "political party" as:

> a political party which, at the next preceding election for governor, polled at least five per cent of the entire vote cast in the State.

(§ 10-2).

19. Candidates of established political parties for the office of Representative in the General Assembly are nominated at primary elections. (§ 8-1 *et seq.*).

20. Persons seeking established party nominations for state legislative office qualify for the primary election ballot by, *inter alia*, filing nominating petitions 99-92 days prior to the Primary Election. (§ 8-9).

21. Petitions supporting the candidacy of persons seeking established political party nominations must be circulated and attested to by a registered voter of the political division in which the candidate seeks office. (§ 7-10).

22. Independent (non-party) candidates and candidates of "new" (non-established) political parties for the office of Representative in the General Assembly are nominated by petition only and stand for election at the General Election. (§§ 10-1 *et seq.)*.

23. Independent (non-party) candidates for the office of Representative in the General Assembly present their nominating petitions at the same time as established party candidates for the same office. (§ 10-3).

24. Petitions to form a new political party and to nominate candidates for the office of Representative in the General Assembly of such a party file their nominating petitions 99-92 days prior to the General Election. (§ 10-6).

25. Petitions supporting the candidacy of independent (non-party) and new (non-established) political party candidates for the office of Representative in the General Assembly must be circulated and attested to by a registered voter of the political division in which the candidate seeks office. (§ 10-4).

26. Certificates of nomination and nomination papers, being filed as required by the Illinois Election Code and being in apparent conformity with the provisions of the Code, are deemed to be valid unless an objection thereto is filed. (§ 10-8).

27. Nothing in Article 7 of the Illinois Election Code prohibits the same person from circulating nominating petitions for candidates of more than one established political party. (§ 7 *et seq.*).

28. Section 10-4 prohibits a new party candidate from circulating petitions for himself in the general election if he:

a. circulated petitions for himself as an established party candidate for the same office in the primary; or

b. circulated petitions for himself as an established party candidate for a different office in the primary; or

c. circulated petitions for an established party or independent candidate to be voted upon at the primary or general election.

29. Section 10-4 prohibits a new party candidate who lost as an established political party candidate in the primary for the same office or a different political office from using as circulators for the general election supporters who:

a. circulated petitions for him in the primary; or

b. circulated petitions for another established party independent, or new party candidate to be voted upon at the next primary or general election.

30. Section 10-4 prohibits supporters of a new party candidate from circulating new party petitions if they:

a. circulated petitions for the same person as an established party candidate for the same office or a different office in the primary; or

b. circulated petitions for another established party, independent or new party candidate for the same office or a different office to be voted upon at the next primary or general election.

31. "Running for Office: A Candidate's Guide," prepared by the defendant State Board of Elections for the 1980 elections, states on page 15:

> Article 10 of the Illinois Election Code explains in detail how to seek office in Illinois as an Independent;

and states on page 17:

> Article 10 of the Illinois Election Code deals with new political parties – how they are formed and

how their candidates get on the general election ballot.

32. The language of § 10-4 of the Illinois Election Code, on its face, does not prohibit persons from circulating or certifying petitions for more than one independent candidate to be voted upon at the next general election.

33. The State Board caused to be prepared, printed and published a document entitled *Running For Office, A Candidate's Guide (1980)* which states, on page 3 that:

> **Petition Circulator**
>
> * * *
>
> (c) may not circulate for more than one party; nor for more than one party and one independent candidate in same election.

34. The State Board caused to be prepared, printed and published a document entitled *A Candidate's Guide for 1982 Elections* which contains a section (pages 3-8) devoted to "Preparing and Filing Nomination Papers" and a statement therein which reads in part:

> All candidates for public office in Illinois - whether they are established party candidates, candidates of new parties or independents – must carefully follow the law when filing their nominating papers.
>
> * * *
>
> The following is a step-by-step outline of the proper way for a candidate to meet these filing requirements.
>
> **II. Petition Circulator**
>
> * * *
>
> b. May not circulate for more than one party (Chap. 46, Art. 10-4); may not circulate more than one independent's petition for each office or elected (Chap. 46, Art. 10-4); may not circulate for an independent candidate

or candidates in addition to a political party candidate in the same election (Chap. 46, Art. 10-4)."

35. The State Board caused to be prepared, printed and published a document entitled *A Candidate's Guide for 1983 Elections* which contains a statement at page 6:

"2. Petition Circulator

* * *

b. A petition circulator may not circulate for more than one for one party and for one independent candidate in the same election; and may not circulate for more than one independent candidate for each office. (Chapter 46, Secs. 10-3 and 10-4)."

36. Section 10-2 of The Election Code defines the term "political party," as used in Article 10, to mean any " 'established political party' and also any political group which undertakes to form an established political party in the manner provided for in Article 10."

In addition, the Court makes the following findings of fact based on the evidence submitted.

37. Both the Sixteenth Legislative District and the Thirty-first Representative District are in the Englewood Community Area of Chicago, Illinois.

38. Plaintiffs were required to obtain 1,500 signatures to nominate Moore as a new party candidate for the 31st Representative District. Plaintiffs actually submitted 3,829 signatures collected by Moore and six circulators. Moore alone obtained 975 signatures out of the 3,289 signatures submitted. The Board invalidated those signatures obtained by Moore because of the circulator restriction in § 10-4. The Board also invalidated an additional 1,493 signatures for reasons unrelated to § 10-4. Consequently, the Board accepted as valid only 1,361 of the 3,829 signatures submitted to nominate Moore.

39. Moore was unaware of the circulator provision in § 10-4.

40. Plaintiffs failed to offer sufficient evidence to establish that an additional 139 valid signatures could not have been obtained because of a limited pool of circulators.

OPINION AND CONCLUSIONS OF LAW

Ballot access restrictions on voters and candidates implicate fundamental constitutional rights. *Anderson v. Celebrezzi*, 460 U.S. 780 (1983); *Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972); *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). Restrictions on access to the ballot burden the right of individuals to associate for the advancement of political beliefs and the right of voters to cast their votes effectively. In *Anderson* the Supreme Court outlined the analytical process a court must pursue to resolve the merits of such constitutional challenges:

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seek to vindicate. It then must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. 780, 789.

Plaintiffs make two basic arguments. First, they contend that the challenged provision of § 10-4 violates the Equal Protection Clause of the Fourteenth Amendment because it applies only to new political parties and independent candidates. Second, even if § 10-4 does apply to established political parties as well as to new political parties and independent candidates, plaintiffs contend that the

defendants have not shown that the state has a compelling interest which justifies the burdens imposed by § 10-4 on the First and Fourteenth Amendment rights of new political parties, candidates and voters.

I. The Equal Protection Claims

Plaintiffs' argument that § 10-4 violates the Equal Protection Clause rests on their interpretation of the provision as applicable only to new parties and independent candidates. This construction, however, is not supported by an examination of Article 10. Article 10 is broader than plaintiffs claim and is interrelated to Articles 7 and 8. Article 10 provides for the manner in which established political parties are created. The provisions of this Article also govern the filing and hearing of objections to nomination papers filed pursuant to Articles 7 and 8 which apply to established political parties, as well as those filed pursuant to Article 10.

Moreover, § 10-2 provides that the term "political party," as used in Article 10, shall include "any established political party," defined as any party receiving over 5% of the vote cast for any elective office. Thus § 10-4, in prohibiting a person from circulating nominating petitions for candidates of more than one "political party" or for an independent candidate in addition to a "political party" was expressly and specifically intended to apply to both established and new political parties.

The State Board of Elections has published several documents and pamphlets which are used as candidates' guides. It has consistently interpreted the circulator restriction provision in § 10-4 to apply to all political parties and has never made the distinction between established political parties and new political parties and independents suggested by the plaintiffs.

The fact that the Board of Election Commissioners of the City of Chicago may have decided two cases contrary to the position taken by the State Board does not give

rise to a situation found to exist in *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970) (unannounced change in election board policy violates due process). There is some distinction between this case and the *Phipps* and *Burrell* cases,[2] but of greater importance is the fact that the statutory language is clear and the State Board has consistently advised candidates that the circulator provision applies to all circulators. Accordingly, there is no invidious discrimination between established political parties and new parties or independent candidates. Plaintiffs' Equal Protection claim is rejected.

II. The First and Fourteenth Amendment Claims

Plaintiff Moore testified that during the summer of 1981 he decided to become a Democratic candidate in the March, 1982 primary election for the office of State Senator for the Sixteenth Legislative District. Moore had voted in past Democratic primaries and had been a candidate in the 1980 Democratic primary for representative in the General Assembly. Moore and his supporters circulated petitions for the office of State Senator. However, before the primary he withdrew his name for the nomination.

Moore and his supporters then decided to form a new political party and circulate petitions for Moore's candidacy in the general election for the office of Representative in the General Assembly for the Thirty-first Legislative District. Both districts are in the Englewood community. Because Moore and some of his supporters circulated petitions on his behalf, some of the signatures were invalidated. Moore was required to submit 1,500 signatures. He submitted 3,829 signatures. However, due to the circulator provision and other unrelated defects only 1,361 signatures were valid.

---

[2] *In re Phipps*, 80 E.B. 3 (1984); *In re Burrell*, 80 E.B. 1979). According to the Board's decisions, the circulator provision was not enforced because the Board could not tell which petitions were obtained first.

Although Moore testified, presumably in support of his free speech and association claims, that his interest lay outside of the Democratic party, there is a question as to whether his interests were outside of that party when he chose to abandon the party and run as a member of a new party. In any event, he was not prohibited by the Election Code from running as a new party candidate.

The state may regulate the conduct of each political party on the ballot and may insist that intra-party competition be settled before the general election. *American Party of Texas v. White*, 415 U.S. 767, 781 (1974); *Bendinger v. Ogilvie*, 335 F. Supp. 572 (N.D. Ill. 1971). The circulator provision is a rational method of regulating such contests in order to prevent abuse, party splintering, factionalism, and voter confusion.

The circulator provision is designed to provide stability. Voter confusion can easily occur (here in the same area) if circulators are allowed to switch sides in the same campaign. Abuse or at least confusion can occur if professional circulators serve competing interests espousing divergent views. Just as voters may be limited to nominating one candidate or supporting one party in a primary election, and candidates may be limited to running under the banner of one party, so too are circulators, whose importance to a political party or campaign is significant, limited to campaigning on behalf of one political party or independent candidate in the same election. The circulator restriction provision is a permissible integral part of an overall legislative scheme to regulate elections.

The burden to First and Fourteenth Amendment rights involved is the task of obtaining petition circulators who have not already circulated petitions for another party in the same election. Moore stated this would have been difficult. Moore also stated that he was unaware of the requirement. The question is whether the requirement of obtaining different circulators would have been unduly burdensome. However, there is insufficient

evidence to support a finding that obtaining alternative circulators would have been too great a burden. Moore did not attempt to find other circulators. The petitions submitted contained twice the number of signatures required. Plaintiffs submitted 1,361 valid signatures and needed only 139 additional signatures to have Moore's name placed on the ballot. This evidence does not prove that there was a shortage of circulators or that the burden imposed outweighs the statutory objectives and benefits. *Cf. Storer v. Brown*, 415 U.S. 724 (1974).

The plaintiffs' First Amendment associational rights were not unduly burdened. The statute did not prevent Moore's candidacy. Therefore the circulator restriction does not mandate strict construction although it would survive such a test. The statute requires that circulators make a choice of political parties and remain with that party or independent candidate throughout an election. This is not an unconstitutional burden.

Accordingly, this Court finds the issues in favor of the defendants and against the plaintiffs and dismisses this case on the merits.

ENTER:

/s/ WILLIAM T. HART
UNITED STATES DISTRICT JUDGE

Dated: Nov. 28, 1984

No. 88-491

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITIZENS FOR JOHN W. MOORE PARTY, JOHN W. MOORE, and WILLIE ANDERSON,

Petitioners,

v.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT ILLINOIS STATE BOARD OF ELECTIONS

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QUESTIONS PRESENTED

1. Whether this case is moot, where the 1982 election has been concluded; where petitioner Moore subsequently abandoned his independent political party and ran in a 1984 primary election as a candidate for the Democratic party; and where, in the last three general elections, no similar factual scenario involving either petitioner Moore or any other candidate has ever recurred.

2. Whether section 10-4 of the Illinois Election Code violates a candidate's right to free speech when it prohibits him from circulating his own election petitions as a candidate of a new political party because he has, in the same election season, already circulated his own petitions to run in the primary election of a different political party.

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No. 88-491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITIZENS FOR JOHN W. MOORE PARTY, JOHN W. MOORE, and WILLIE ANDERSON,

Petitioners,

v.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT ILLINOIS STATE BOARD OF ELECTIONS

The respondent Illinois State Board of Elections respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion of April 18, 1988. That opinion is reported at 845 F.2d 144 (1988).

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE PETITION SHOULD BE DENIED BECAUSE THE CONTROVERSY IS MOOT.

In the instant case petitioners challenge the constitutionality of a portion of section 10-4 of the Illinois Election Code. Ill. Rev. Stat. ch. 46, ¶ 10-4 (1987). That statute provides in pertinent part:

> [N]o person shall circulate or certify petitions for candidates of more than one political party, or for an independent candidate or candidates in addition to one political party, to be voted upon at the next primary or general election. . . .

As the Court of Appeals explained, this law operates to prevent anyone from collecting signatures on behalf of different political parties during the same election season. *Citizens for John W. Moore Party v. Board of Election Commissioners* (*Moore III*), 845 F.2d 144, 145 (7th Cir. 1988).

Because Moore had been a circulator for the Democratic party in the primary, he could not be a circulator for a different party during the same election period. *Id.* at 146. Since Moore violated this law by collecting signatures for his candidacy in the 1982 general election as a member of the Citizens for John W. Moore Party, those signatures were deemed invalid, and, as a consequence, he failed to submit the requisite number of valid signatures to place his name on the ballot.

Initially, petitioners sought an injunction to have Moore's name placed on the 1982 ballot. That injunction was de-

nied by the district court, but this litigation has been pending since that time, through three more Illinois general election seasons, with respect to the constitutional issues raised by petitioners. In response to petitioners' request that this Court now proceed to entertain this matter or to remand it for yet another opinion from the Seventh Circuit, respondent respectfully suggests that this matter is moot and that no further proceedings are warranted.

The jurisdiction of the federal courts is limited by Article III of the Constitution to the adjudication of actual ongoing controversies between litigants. *Deakins v. Monaghan*, ____ U.S. ____, 108 S. Ct. 523, 528 (1988). "The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1987). Accordingly, a case is moot if "there is no subject matter on which the Court's order can operate." *Ex parte Baez*, 177 U.S. 378, 390 (1900).

A dispute may avoid dismissal on mootness grounds if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). In *Weinstein v. Bradford*, 423 U.S. 147 (1975), this Court applied a two-part test for determining if this exception should apply. It explained that a case is not moot where: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there [is] a reasonable expectation that the *same complaining party would be subjected to the same action again*. 423 U.S. at 149 (emphasis added). *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979). Given the brief nature of any single election season, the instant suit does satisfy the first element of the test.

There is, however, no reasonable expectation that the same complaining parties will be subjected to the same action again. In order for this to occur, Moore would again have to circulate petitions to be a candidate for a primary election; he would have to withdraw before the primary; then he would have to wish to run in the general election under a different party and solicit signatures in support of his candidacy in the general election. If all this were to take place, the Chicago Board of Election Commissioners, sitting as the appropriate electoral board, would exclude only the signatures gathered in violation of the law. If the remaining valid signatures were too few to meet the statutory requirement, then Moore's name would not be placed on the ballot. Only if there exists today a "reasonable expectation" that all these events will recur can it be concluded that this case is not moot.

As demonstrated by the statement of the State Board of Elections appended to this brief, not only has this scenario—involving either John W. Moore or any other would-be candidate—failed to recur in the last three general election seasons, but Moore did in fact stand as a candidate in a 1984 Democratic primary election. There is no record that he sought, during the 1984 election season, to undertake any activity on behalf of the Citizens for John W. Moore Party, or that he pursued any State political aspirations in the two election years that followed his 1984 defeat. Based upon this subsequent action (or inaction) of Moore, it must be concluded that this case is moot.

Such a conclusion is bolstered by other cases in which this Court has had occasion to address the mootness issue in an election litigation context. *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Hall v. Beals*, 396 U.S. 45, 47 (1969); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75

(1978); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979); *Meyer v. Grant*, ____ U.S. ____, 108 S. Ct. 1886, 1890 n.2 (1988). In *Meyer*, for example, this Court held the issue was likely to recur where the plaintiffs continued to pursue adoption of the constitutional reform and obtain signatures necessary to place the referendum on the ballot. *Meyer*, 108 S. Ct. at 1890 n.2.

Similarly, in *First National Bank of Boston*, this Court invalidated a criminal statute prohibiting corporate expenditures regarding individual income tax referenda and held that the issue was not moot, notwithstanding the passage of the 1976 election. 435 U.S. at 765. The case fit within the "capable of repetition, yet evading review" exception because the 1976 election marked the fourth time that the subject referendum was put before the Massachusetts voters and plaintiffs insisted that they would continue to oppose the referendum in the future. 435 U.S. at 775.

In both *Meyer* and *First National Bank of Boston*, the plaintiffs established a strong factual basis for this Court to conclude that there existed a "reasonable likelihood" that those plaintiffs would be subject to the same action again. By contrast, the absence of the Citizens for John W. Moore Party from the political process for six years demonstrates a lack of factual support for any conclusion that there exists a "reasonable likelihood" that the dispute which arose in 1982 will recur. This Court should recognize, therefore, that this matter is moot.

II.

THE SEVENTH CIRCUIT CORRECTLY ANALYZED SECTION 10-4 AS "SIMPLY A LESS RESTRICTIVE ALTERNATIVE TO A PERMISSIBLE SORE LOSER STATUTE" RATHER THAN AS AN ATTEMPT BY THE STATE TO IMPOSE AN UNCONSTITUTIONAL LIMITATION ON A CIRCULATOR'S FREEDOM OF SPEECH.

Relying heavily on this Court's recent decision in *Meyer v. Grant*, ____ U.S. ____, 108 S. Ct. 1886 (1988), petitioners argue that section 10-4 of the Election Code places an unconstitutional limitation on core political speech, by prohibiting Moore from circulating his own petitions to run in a general election as a candidate of a new political party. Petitioners have failed, however, to recognize critical differences between *Meyer* and their own case, differences which require a conclusion that the holding in *Meyer* does not extend to the circumstances presented here.

As already explained, section 10-4 provides that a person may not circulate candidate petitions for more than one political party (or for a party member as well as an independent candidate) during the same election season. Ill. Rev. Stat. ch. 46, ¶ 10-4 (1987). Application of the statute to the circumstances of this case required the invalidation of signatures obtained by Moore as a candidate of the Citizens for John W. Moore Party in the 1982 general election, as Moore had previously circulated petitions for his candidacy in the 1982 Democratic primary election. Because of the operation of this provision, Moore's attempted general election candidacy fell 139 signatures short of the total required for a place on the ballot.

The statute did not, however, preclude Moore from speaking with or in any other way soliciting the support of potential voters. Indeed, section 10-4 in no way prohibited

Moore from accompanying a qualified circulator, explaining the nature of his candidacy (and, if he chose, the reason why he could not circulate his own petitions), disclosing his political agenda, or requesting the support of his constituency.

It is important to recognize that the statute contains no blanket prohibition of a candidate's efforts on his own behalf; it only affects his activity as a circulator if he has already, during the same election year, acted as a circulator on behalf of a different party or independent candidate. Essentially, the statute allows a would-be candidate who also wants to circulate his own petitions only one opportunity per election season to align himself with a chosen political party or to seek support as an independent candidate.

As the Seventh Circuit noted, this Court has held that there is no fundamental right to be a candidate. *Clements v. Fashing*, 457 U.S. 957, 963 (1982). Thus, a State may constitutionally impose candidacy restrictions that would absolutely preclude a person in Moore's position from seeking a place on the 1982 general election ballot. *Storer v. Brown*, 415 U.S. 724 (1974). The lesser restriction imposed by section 10-4, which operates only because of Moore's prior decisions to run as a Democrat in the 1982 primary election and to circulate his own petitions at that time, is not unconstitutional as a matter of logic or as a matter of precedent.

This Court's decision in *Meyer* does not obviate the above conclusion. At issue in *Meyer* was a State law making it a felony to pay circulators of "initiative petitions" to have proposed new laws or constitutional amendments placed on the ballot at a general election. This Court ruled the criminal penalty statute unconstitutional, focusing on the proponents' protected right to convey their message

regarding a desired governmental change. The proposed circulation of petitions by paid circulators was a means to a protected end and thus was entitled to protection from unwarranted interference by the State.

In the case at bar, however, the restrictions imposed upon Moore impacted only on his ability to circulate his petitions as a candidate for a new political party after he had already stood for a Democratic primary election, and circulated his own petitions in connection with that candidacy, during the same election season. The message that Moore subsequently sought to convey—"I want to be your candidate in the general election"—is one which the State might legitimately suppress in its entirety, based upon Moore's primary election candidacy. *Storer v. Brown*, 415 U.S. 724 (1974).

Illinois neither outlawed Moore's second attempted candidacy, nor did it absolutely prevent him from circulating petitions on his own behalf. The State simply required him to limit his circulating efforts to one political party of his choice per election season. Moore made his choice during the primary election, and the State is not prevented by the Constitution from requiring Moore to live with the consequences of that choice. *See Moore III*, 845 F.2d at 146, where the Seventh Circuit acknowledged this Court's observation that "the government may attach rationally-justified consequences to voluntary conduct. . . ," *citing Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976). Thus, it cannot be said that State action deprived Moore of his right to freedom of speech. Rather, his ability to seek candidacy is what is ultimately at issue here, and the State's regulation of that activity is less severe than that which is allowable under the Constitution. Moore was free under Illinois law to circulate petitions for his candidacy and thereby convey whatever message he wished by virtue

of this activity, so long as he did not attempt to circulate petitions for different parties during the same election season. Neither the holding nor the reasoning of this Court in *Meyer* is applicable to the circumstances presented here, and that decision does not warrant issuance of a writ of certiorari in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

[*Letterhead Of*]

STATE BOARD OF ELECTIONS
STATE OF ILLINOIS

December 8, 1988

The Honorable Neil F. Hartigan
Attorney General of Illinois
SOIC - 12th Floor
100 W. Randolph St.
Chicago, IL 60601

ATTENTION: Rosalyn Kaplan, Civil Appeals

RE: Citizens for John W. Moore Party

Dear Mr. Attorney General:

At the request of your Division of Civil Appeals, I have searched the records of the Illinois State Board of Elections to determine if, since 1982 John W. Moore or any group of citizens acting on his behalf as petitioners, have submitted petitions for Moore for any state-wide offices in any partisan primary; withdrawn those petitions prior to the primary itself; and subsequently filed new party nominating petitions for any office to be voted on at the same election at which the winner of the primary would also be a candidate. I have examined the records of the general elections of 1984, 1986 and 1988.

My review disclosed only that John W. Moore submitted nominating petitions for the primary election of 1984 as a candidate for the Democratic nomination for State Senator from the 12th legislative district of Illinois. Mr. Moore did not withdraw those petitions; rather, he was a participant in that primary election and lost the

nomination to Charles Chew, who subsequently won the seat in the general election.

My inquiry further discloses that neither John W. Moore or any group of citizens acting in his behalf, nor any other candidate or group of citizens acting in his or her behalf, has since 1982 first filed nominating petitions in a partisan primary for state office, next withdrawn those petitions, and finally filed new party nominating petitions for any office to be voted on at the same election at which the winner of the primary would also be on the ballot.

Yours, truly,

/s/ A. L. ZIMMER
A. L. ZIMMER
General Counsel

ALZ/dlg